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ABSTRACT

This policy paper provides a rationale for assessing the issue of school vouchers with emphasis on students with disabilities. It provides the following major findings: (1) rights under the Individuals with Disabilities Education Act (IDEA) generally do not extend to participants in voucher programs; (2) evaluative studies of school choice and voucher options have shown mixed results and special education has usually been ignored; (3) vouchers usually only cover a portion of special education costs above the cost of private school tuition; (4) principles of school choice and voucher programs may not be consistent with IDEA principles such as accountability for results; (5) types of structure, policies, and procedures of voucher programs profoundly affect student rights; and (6) choice provisions offered general education students must also be extended to special education students. This paper offers some guiding questions for policy makers and education leaders. It concludes that they have a major challenge to ensure that any development of school vouchers is based on the direct input of parents, positive results for students with disabilities, sound empirical research of its effectiveness as a policy option, and is in accordance with applicable federal (and state) law and civil rights legislation. (Contains 98 references.) (DB)

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National Council on Disability
An Independent agency working with the President and Congress to increase the inclusion, independence, and empowerment of all Americans with Disabilities

SCHOOL VOUCHERS AND STUDENTS WITH DISABILITIES[1]

Policy Paper

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EXECUTIVE SUMMARY

The enactment of the Individuals with Disabilities Education Act (IDEA) codified the Constitution's guarantee of equal protection under law for all children and youth with disabilities, providing them with a free appropriate public education that meets their education and related services needs in the least restrictive environment. The implementation of IDEA has produced important improvements in the quality and effectiveness of the education received by more than six million children and youth with disabilities. In recent years, a vigorous debate has emerged on the use of educational vouchers to encourage greater choice to parents and students in public education service delivery. Policy makers have offered school choice and voucher proposals in the context of the reauthorization of IDEA. Yet, no comprehensive examination has been made of the general conditions that determine whether school vouchers are an effective educational instrument for students with disabilities.

The National Council on Disability's (NCD) *School Vouchers and Students with Disabilities* policy paper provides a rationale for assessing the issue of school vouchers, and contains the following major findings:

1) IDEA rights, as a general rule, will not extend to children and youth with disabilities who participate in voucher programs. Section 504 of the Rehabilitation Act and the Americans with Disabilities Act will still apply to the administration of the voucher program but not to most activities of the private school.

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2) School choice and voucher options have expanded slowly over the past decade and established beachheads in several urban settings with mixed results from large-scale evaluative studies. Special education has been left out of the process for the most part, with the exception of the statewide Florida McKay Scholarship Program, which may not provide a working model for extending vouchers under reauthorized IDEA since it does not hold private schools of choice to the same accountability requirements to which public schools are held.

3) Because vouchers can only cover a portion of costs of special education over and above the cost of private school tuition in many cases, particularly for students with moderate, low-incidence and severe disabilities, such programs may benefit only the affluent who can afford to supplement vouchers to cover actual costs. Since school districts will lose students and a proportion of state funds due to transfers to private schools, it is possible that public schools will be left to serve only poor students with more significant disabilities, and at a reduced level of financial support.

4) The principle of school choice, and voucher programs in particular, have not been adequately shown to be internally consistent and mutually reinforcing with regard to the other three principles of IDEA reauthorization (accountability for results, increasing local flexibility, and a focus on what works) outlined by the U.S. Department of Education (ED).

5) The type of structure, policies, and procedures that are incorporated into a voucher program profoundly affect the rights of students in that program, produce different legal issues, and may also produce significantly different outcomes for those in the program.

6) Since children receiving special education are general education students, choice provisions such as those detailed in the No Child Left Behind Act must also be extended to special education students. As the U.S. Department of Education has pointed out, the private schools of choice must be accessible and be able to implement the IEP of the previous school.

Based on NCD's analyses, the following guiding questions are recommended to policy makers' for immediate consideration as they explore the issue of whether vouchers should be used for students with disabilities, particularly through the enactment of federal legislation.

1) Whether private schools accepting vouchers for students with disabilities should be held to the same standards of accountability and compliance with IDEA as public schools serving the same students?

2) Whether private schools accepting vouchers for students with disabilities should provide evidence that they meet and fully comply with the IDEA provisions for educating students in the least restrictive environment (LRE)?

3) Whether a proposed voucher act would ensure that parents of students under IDEA eligible to receive vouchers would be provided with sufficiently detailed information concerning school choice options addressed particularly to the need for specialized supports and services needed to assure FAPE for their child, to enable them to make a reasoned and informed choice?

4) Whether vouchers for students with disabilities should be funded at a level sufficient to cover private school tuition and excess educational costs for the least expensive private school within a reasonable transportation distance that can provide all necessary supports, services and accommodations required to provide a FAPE to such students in the LRE?

5) Whether school districts losing students with vouchers and/or schools accepting vouchers from students with disabilities should provide accessible transportation to and from school, and should be fully accessible environments for such students?

In addition to these guiding questions, NCD believes that the U.S. Department of Education should conduct scientific investigations of programs extending voucher options to students with disabilities.

NCD concludes that policy makers and education leaders have a major challenge ahead of them to ensure that any development of school vouchers is based on the direct input of parents, positive results for students with disabilities, sound empirical research of its effectiveness as a policy option, and in accordance with applicable federal (and state) law and civil rights regulations.

INTRODUCTION

This policy paper addresses the applicability and/or efficacy of extending publicly funded school voucher options to students with disabilities served under the Individuals with Disabilities Education Act (IDEA). This paper will primarily focus on vouchers that allow public education funds to be used by eligible participants to attend private schools and the impact of such programs on the education of students with disabilities. Other school choice options, such as charter and magnet schools, will be discussed only as they compare to and differ from voucher programs.

The number of publicly funded voucher programs created primarily for general education students is steadily increasing and is likely to accelerate. While only ten states plus Puerto Rico currently have some variant on a voucher program, sixteen other states introduced legislation during the 2002 session to create some form of school voucher. Since the Supreme Court's decision in *Zelman v. Simmons-Harris* (2002) removed what was widely perceived to be the most formidable legal barrier to vouchers, more states are likely to consider enacting voucher programs in 2003, and are also likely to take advantage of the choice and flexibility provisions of the No Child Left Behind Act of 2001 (NCLB). NCLB is the first federally supported (though not mandated) program that allows federal funds to purchase educational services from private entities. As more

voucher programs are initiated, students with disabilities will be increasingly affected, especially if some of the programs are created specifically for students in special education.

There are three ways in which voucher programs may affect students with disabilities. First, students with disabilities receive general education services as well as special education and are generally entitled to participate in any and all regular school programs available to students without disabilities. Thus, voucher programs for general education students directly apply, or should apply, to students with disabilities as well as those without disabilities. Second, students with disabilities educated within traditional public school settings may be indirectly affected by changes in the resources or structure of the public school in response to voucher initiatives. Finally, and most significantly, voucher programs may be targeted specifically at students with disabilities who need special education services.

Discussions about the reauthorization of IDEA in 2003 increasingly involve the possibility of extending school choice options to students served under IDEA as a potential innovation in educational services to this population. This developing conversation has already engendered controversy, and will continue to do so.[2]

In June 2002, the President's Commission on Excellence in Special Education released its final report (PCESE, 2002) in which it laid out 33 specific recommendations, of which the most controversial were expected to be those calling for the elimination of short-term objectives in Individualized Education Programs (IEPs) and the others having to do with vouchers.[3] For example, under a recommendation entitled, "Increase Parental Empowerment and School Choice", the report suggests, "IDEA should increase informed opportunities for parents to make choices about their children's education. Consistent with the No Child Left Behind Act, IDEA funds should be available for parents to choose services or schools, particularly for parents whose children are in schools that have not made adequate yearly progress under IDEA for three consecutive years" (p. 35).

In another section of the PCESE report, the Commission linked its voucher recommendations to increase flexibility with regard to the Least Restrictive Environment (LRE) requirements of IDEA. "Federal policy should also provide the flexibility states need in this area, including the flexibility to define Charter Schools' local education agencies status in ways that maximize the capacity of such schools to meet the needs of children with disabilities. In addition, federal policy should make clear that families working with IEP teams can choose charter schools and other choice options that target students with disabilities, even if these offer relatively restrictive environments, as long as those programs can appropriately serve the student" (p. 39).

Since the PCESE Report was intended to provide a blueprint for upcoming Congressional reauthorization of IDEA, these recommendations bear careful scrutiny, given the intricate complexity of various provisions of IDEA as these pertain to parents' rights. This is especially true in light of recent comments of the U.S. Secretary of Education, Rod Paige, who said, "Our goal is to align IDEA with the principles of NCLB

by ensuring accountability, more flexibility, *more options for parents*, and an emphasis on doing what works to improve student achievement." Unfortunately, there are few extant applications of school choice models to special education from which to examine results.

Finally, the PCESE made it clear that it intended private schools serving students with disabilities to be held to the same standards of accountability that apply to public schools.

> "The Commission recommends greater flexibility in using federal funds, allowing states to create parental choice programs while preserving the student's basic civil rights. However, we recommend that any such programs also require schools and programs to be held to the same accountability requirements for public schools, ensuring that students achieve excellent results." (p. 39).

The only relevant example of a voucher program for individuals with disabilities, at present, is Florida's two-year-old special education voucher program called the McKay Scholarship Program. Under this program, which began in 2000, families of students with disabilities may receive vouchers for the asking, regardless of their schools' grade for performance as determined by the state. These vouchers have a value equal to the existing, annual expenditures for educating the student as estimated by the District, or the cost of private school-of-choice tuition, whichever is the lesser amount.[4] Apart from the two-year-old Florida experiment with the McKay Scholarship Program, little is known about the utilization and effects of making school choice vouchers available to students with disabilities, particularly those with severe or extensive disabilities.

Lacking any basis in scientific evidence to recommend for or against vouchers for students served under IDEA, it becomes important to examine the evidence for success and failure of existing *general education* voucher schemes as measured against their stated purposes, and then to extrapolate from these experiments to the particular statutory and programmatic requirements of educating students with disabilities.

We proceed for this purpose, first by examining the philosophical and ideological arguments for and against school choice, and laying out a "roadmap" of extant choice/voucher options and then examining the legal and statutory issues involved, including those applicable to students served under IDEA. Next, we review the available evidence from research investigations of those choice/voucher models that have at least potential relevance for students with disabilities. We conclude with a review of salient issues and a set of recommendations for policymakers to consider in extending choice/voucher options to families of students with disabilities.

BACKGROUND

Any educational reform effort should be prefaced by a careful examination of the past. To understand the motivations and goals of reform, we must know its history. It is only then, in retrospect and through careful study, that we can truly evaluate the efficacy of past reform efforts and the probable course of future reform efforts. With this purpose in mind, we examine the history of special education law and policy and the history of vouchers.

The History and Law of Special Education

IDEA and the Six Principles of FAPE

Congress first addressed the education of students with disabilities in 1966 when it amended the Secondary Education Act of 1965 to establish a grant program to assist states in the "initiation, expansion, and improvement of programs and projects . . . for the education of handicapped children." In 1970, that program was replaced by the Education of the Handicapped Act (P.L. 91-230) that, like its predecessor, established a grant program aimed at stimulating the States to develop educational programs and resources for individuals with disabilities. Neither program included any specific mandates on the use of the funds provided by the grants; nor could either program be shown to have significantly improved the education of children with disabilities. In the early 1970s, two federal court cases provided the first substantial steps forward in the education of individuals with disabilities. *Pennsylvania Assn. for Retarded Children (P.A.R.C) v. Commonwealth* (1971) and *Mills v. Board of Education of the District of Columbia* (1972) held against discriminatory exclusion practices of school districts and opened up public schools to children with disabilities.

In 1974, Congress found these exclusionary practices to be widespread. 1.75 million children with disabilities received no educational services and an additional 2.5 million received an inappropriate education. Congress responded with the passage of Public Law 94-142, the Education for All Handicapped Children Act of 1975 (EHA). The amended EHA, as with previous efforts, provided federal funds for the education of children with disabilities. Unlike prior grant programs, it included specific mandates regarding the provision of services to individuals with disabilities. In enacting the EHA, Congress intended that States would be held accountable for providing a free appropriate public education (FAPE) to all children with disabilities. The law contained provisions supporting six principles to guarantee FAPE for all children with disabilities:

1). Zero Reject. Each school-aged person (student) with a disability has a right to be educated and included in a system of free appropriate public education (FAPE). Zero reject mandates that no student with a disability will be explicitly or functionally excluded from the provision of FAPE. IDEA supports the Zero Reject principle in several ways. For example, IDEA mandates:

- An annual child census to identify, locate, and evaluate children with disabilities

- The removal of physical barriers that impede access to schools
- Procedures to address behavior problems that might otherwise result in removal
- That educational services be continued even during periods of suspension or expulsion

2). Nondiscriminatory Evaluation. Each student suspected of having a disability must receive an unbiased, individualized assessment that identifies (a) whether the student has a disability, (b) whether the student needs special education services, and (c) the strengths and needs of the student. The methods used for evaluation must be multidisciplinary and discount socioeconomic, language, and other factors unrelated to the student's educational success. The results of the evaluation must form the basis of the plan for the individualized education of each student with a disability.

3). Individualized and Appropriate Education. All students with disabilities are entitled to a beneficial education. Each student with a disability must receive appropriate special education and related services that address his or her individual strengths and needs as assessed by the nondiscriminatory evaluation. An individualized education program (IEP) must be created that includes provisions to ensure the child receives an appropriate education:

- A statement of the student's present levels of educational performance
- A statement of how the student's disability affects his or her involvement in the general curriculum
- A statement of measurable annual goals and short term benchmarks
- A statement of the specific special education and related services the child will receive
- A statement of the identified transition needs of the student beginning at age 14
- A statement of how the student's progress will be measured

4). Least Restrictive Environment. Each student with a disability must be educated in the most inclusive setting appropriate for that student. Students with disabilities must be educated with children without disabilities in regular classrooms, participate in the general curriculum, and be included in other nonacademic activities with students who do not have disabilities to the maximum extent possible. Special classes, separate schooling, or other removal of students with disabilities from the general education environment may occur only when the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. The student's IEP must also include an explanation of the extent, if any, to which the child will not participate with students in general education or in the general curriculum.

5). Procedural Due Process. The parents (or other guardians) of each student with a disability have the right to challenge the decisions of the school system and hold the school district accountable for meeting their responsibilities with respect to the other five principles of IDEA. Parental consent must be obtained for pre-placement evaluation and

for the child's initial placement in special education. Parents must be given prior written notice whenever the school proposes to change, or refuses to change, any aspect of their child's educational plan, and of their procedural due process rights. The procedural due process rights of parents include, for example, their right to:

- Request an independent educational evaluation
- Access their child's educational records
- A due-process hearing to challenge school decisions and resolve complaints
- Mediation to resolve disputes about their child's education
- Appeal a due process hearing officer's decision
- Be reimbursed for attorneys' fees when they substantially prevail in a hearing or in court

6). Parent/Student Participation. Because education is made more effective when parents and students are included in the process of designing and delivering special education, parents and students have the right to participate in decisions about that student's assessment, educational plan, and placement. Parents are required members of the teams that carry out the nondiscriminatory evaluation, determine eligibility for special education services, develop the individualized education program, or make placement decisions affecting their child. As members of the IEP team, parents have the right:

- To receive advance notice of all IEP team meetings
- To have mutually convenient scheduling of the meetings
- To have interpreters provided for deaf or non-English-speaking parents
- To have their thoughts, preferences, and opinions considered and generally be involved in the decision making process

The special education movement began as an offshoot of the Civil Rights movement and *Brown v. Board of Education*, but with the passage of the EHA, renamed the Individuals with Disabilities Education Act in 1990 (IDEA), it expanded the definition of equality for individuals with disabilities to include concepts of dual accommodations, integration, entitlement to services, family empowerment, productivity, accountability, and participatory-decision making.

Anti-discrimination Laws. Though unarguably the most important law guiding special education, IDEA is not the only statute that protects the educational rights of students with disabilities. Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act prohibit schools from discriminating against children with disabilities solely by reason of their disability and require schools to provide reasonable accommodations to students who need them in order to have equal access to educational opportunities. They are civil rights statutes intended to prevent discrimination and protect the right of persons with disabilities to equal access, equal treatment, and equal opportunity.

While many proposed special education reforms would not require an inquiry into the application of Section 504 and the ADA to schools, vouchers prove a special case. Because vouchers move students with disabilities outside the public system, it becomes

important to examine disability law with respect to non-public entities. While Section 504 and the ADA are anti-discrimination statutes that provide little in the way of educational entitlement when compared with IDEA, both Section 504 and the ADA can apply to entities outside the context of public schools. In other words, as extensions of constitutional protections against discrimination, these laws are in some ways more likely to follow voucher dollars wherever educational reform may take them.

Recent and Future Reforms

The most recent major amendments to IDEA occurred in 1997. The 1997 amendments documented the successes and failures of past efforts to provide full educational opportunities to individuals with disabilities and proposed new solutions to ensure that students with disabilities would receive a free appropriate public education (FAPE) designed to meet their unique needs and prepare them for employment and independent living. But despite the breadth of the '97 amendments, the basic purpose of IDEA to provide FAPE to all children with disabilities, and its support for the six principles to ensure this purpose, remain unchanged. The '97 amendments refined and strengthened these principles with new understandings of cultural responsiveness, positive behavioral interventions, and the needs of students with disabilities who are transitioning out of school.

Since the inception of the modern age of special education, with the enactment of the Individuals with Disabilities Education Act 28 years ago, students with disabilities have witnessed incremental educational gains. Specific accomplishments include increased access to regular education, improved outreach to identify children who need special education, and somewhat better rates of high school graduation, college enrollment, and employment among students who received special education compared to those served over the previous decade. Yet these accomplishments exist only in comparison to prior widespread exclusion of individuals with disabilities from general education and neighborhood schools. Students with disabilities and their parents still face numerous barriers to the free appropriate public education (FAPE) promised by the Act. It is these unmet expectations that have sparked discussion about the use of vouchers to reform special education when IDEA is reauthorized in 2003.

Special education has embraced the six principles of IDEA and the goal of FAPE for 28 years. They are deeply rooted in the history of special education and the disability rights movement. Future special education reforms, whether they include vouchers or not, must be carefully measured in relation to their probable impact on FAPE and their effect on the six principles of IDEA.

History of School Choice

The present wave of school reform efforts in America can be roughly traced to the publication, in 1983, of *A Nation at Risk* (Boyer, 1983). Against this backdrop of generally depressing statistical trends in student performance, particularly in urban settings, Congress and the Department of Education stimulated a number of major reform

efforts that continue today. These efforts, collectively, can be generally grouped into three discreetly different approaches: *local investment strategies* such as school-linked service integration models; *accountability/high-stakes assessment models*; and *free-market models*.

Of these urban education reform approaches, probably the local investment strategies are least understood. The best known of these models are the "Community School" (cf., Lawson & Briar-Lawson, 1998; Lawson & Sailor, 2000), the "Enabling Component" (Adelman & Taylor, 2000), and the "Full Service School" (Dryfoos, 2000). Although these models have been extensively disseminated (i.e., Schorr, 1999), there has been little controlled research against which to assess efficacy, particularly with respect to special education (Lawson & Sailor, 2000).

The most prolific class of school reform approaches during this period has been the school accountability approaches (cf., Newman, King, & Rigdon, 1997). With the emergence of standards-based reform and high-stakes assessment in the latter part of the past decade, accountability models are now prolific in America's cities. Much of the support for this reform process has come from the Comprehensive School Reform Demonstration project of the (former) Office of Educational Research and Improvement branch (OERI) of the U.S. Department of Education, often in partnership with numerous private philanthropic organizations.

The third class of reform efforts, free-market models, has emerged, in recent years, from the high-stakes assessment applications under accountability models. Free market models of contemporary school reform originated with a publication by economist Milton Friedman (Friedman, 1955) nearly half a century ago. Friedman laid out the case for a publicly financed, free market school choice model for all that would provide parents with cash vouchers with which to select among schools that would be operated by for-profit or non-profit companies.

While free-market models are, at present, largely linked to accountability, such as the activation of a school choice option as an outgrowth of school failure, there are clear, emerging trends that suggest the instantiation of school-choice and other free-market models as independent, full-scale educational options for all, but particularly aimed at urban schools.

This policy paper is wholly concerned with the applicability of one option to children with disabilities that characterizes the free-market class of reform models, namely school voucher options.

Discourse and Debate on Free-Market Reform Models

One of the most interesting features of the free market reform models as a class is the extent to which they reach directly into the core of traditional American values. In the opening chapter of their book summarizing research on urban school choice models, Howell & Peterson (2002) anchor the rhetoric of school-choice firmly in the principles of

liberty, equality, and freedom, particularly as those are woven into the fabric of our Constitution and our early political history. They correctly point to Dewey (1916) who, early on recognized that public schools were an uncomfortable fit within the liberal tradition as represented in the Declaration of Independence. He reluctantly concluded that public (government assigned) schools were needed to ensure that education would perpetuate democracy and prevent the partition of society into separate social classes. Over time, public schools become, ". . . increasingly uniform, centralized, comprehensive and professional" (Howell & Peterson, 2002, p. 9). By 2000, John Dewey's equality project had evolved into massive structures that isolated schools from their communities.

When publicly financed and operated systems work well and people are satisfied with their benefits, such as in the case of many forms of public transportation, there is no particular clamor for privatization or other change. When systems fail, however, as in the case of urban schools, public sentiment swings toward policies of reform. The process is wholly problematized when wholesale shifts of public systems to radical alternatives occur in the absence of supportive evidence that things will improve. Ernest Boyer drew attention to these risks when he wrote, "We were especially troubled that school choice, perhaps more than any other reform strategy, has become so highly charged, so ideological. There's an intensity, even a zealousness, in the debate on school choice that smothers thoughtful discourse" (The Carnegie Foundation for the Advancement of Teaching, 1992, p. xv). Advocates of choice and other free market reform models will find much to appreciate, in the absence of evidence, in Tooley, 2000; Coulson, 1999; Patrinos & Ariasingam, 1997; Tooley, 1999; West, 1994; Lieberman, 1989; Johnson, 2000; Goodman & Moore, 2001, to mention but a few.

On the other side of the rhetorical coin, see Henig, 1994; Fuller & Elmore, 1996; Berliner & Biddle, 1995; and Kozol, 1991; to name a few who stand in opposition to school choice models. For the most up-to-date compilation of resources to appear as of this writing, see *Trends and Issues: School Choice*, published by the ERIC Clearinghouse on Educational Management of the College of Education, University of Oregon.[5]

Early Developments in Private School Choice

An often forgotten aspect to the history of vouchers is that practice actually preceded theory. The first program authorizing the use of public dollars to fund private school education began in Vermont in 1869. Title 16, Part 2, Chapter 21, § 822 of the Vermont Statutes requires all school districts to maintain schools or reimburse families for the cost to educate their child at an independent school. A similar law was enacted in Maine in 1873. These programs still exist today. Originally enacted to relieve small townships of the burden of maintaining public schools, these choice provisions existed decades before Friedman wrote about a free market educational system.

Efforts to launch the Friedman model of free enterprise education failed to enlist public support at first, but other voucher programs were created in response to *Brown v. Board of Education* in 1954. In Virginia, legislators enacted "tuition grant" and "scholarship" programs that allowed students to use state tax dollars to pay tuition at any

qualifying non-sectarian school, so students could avoid attendance at desegregated schools. The courts quickly dismantled these early voucher programs as their discriminatory purpose made them plainly unconstitutional.

Friedman's theories were again thrust into the public eye when President Richard Nixon's administration advocated a free-market approach first conceived under President Lyndon Johnson. Despite Presidential support, only one school district elected to create a voucher program. The Alum Rock School District in California with funding and promotion from the U.S. Office of Economic Opportunity, tested a voucher model developed by Christopher Jencks and his colleagues at Harvard (Sawhill & Smith, 1998). This program ceased in 1976 when federal funding ran out. A subsequent evaluation of the model provided by the RAND Corporation failed to find any supportive evidence for improved educational outcomes for either schools or students in Alum Rock (Capell & Doscher, 1981).

Nixon's administration attempted to give the free-market model an even greater boost in 1971 when it proposed "Parochiaid" to provide public funds to private schools. This initiative was short lived, however, as the U.S. Supreme Court unanimously decided in *Lemon v. Kurtzman* 403 U.S. 602 (1971) that there were three requirements for the constitutional use of public funds in private schools. First, the distribution of funds to the private school must support a secular purpose. Second, its main effect could not be to advance or inhibit religion. Finally, and most significantly, the use of the funds could not excessively entangle the state in religion. Parochiaid was over before it began, and the private school voucher movement stalled for the next twenty years. The constitutional argument against vouchers was again strengthened in 1973, when the Supreme Court found that tax benefits and tuition grant programs available only to those attending private school had the primary purpose of advancing religion (*Committee for Public Education v. Nyquist, supra, and Sloan v. Lemon 413 U.S. 825*).

Even though the private school voucher movement would not get a full head of steam again until the 1990s, free-market supporters were not idle. Though his efforts were not successful, President Ronald Reagan tried three times to introduce voucher legislation during his terms in office. Minnesota also enacted a tax deduction for parents of all elementary and secondary schoolchildren for public and private educational expenses that was held to be constitutional by the Supreme Court in 1983 because, unlike the program in *Nyquist*, the Minnesota tax deduction applied to all parents (*Mueller v. Allen*, 463 U.S. 388).

Finding it difficult to forward proposals for private school vouchers, school choice advocates shifted their emphasis to a more limited competition-based model: public school choice. The change brought success, and in 1988 Minnesota enacted the first statute authorizing public school choice, and other states quickly followed suit. Widespread acceptance of the public school choice model, which does not include vouchers for private schools, again raised the possibility of free market approaches to school improvement and paved the way for new efforts to promote private school vouchers in the 1990s.

The Modern School Choice Movement

Interest in scaling up models of free-market school reform to include private schools surged again in the early 1990s in response to the publication of *Politics, Markets and America's Schools* (Chubb & Moe, 1990). This publication by the Brookings Institution argued the case for school choice on the basis of a political agenda of the need to break the "monopoly" of urban public schools, rather than on the basis of economics, as posited earlier by Friedman (see also, Peterson, 1990). If it can be argued that within America's urban environments, "white flight" and other socio-economic forces have created a virtual monopoly on public education with a practically guaranteed mediocre education at best, for those trapped in the system (i.e., Cohen, 1990), then an argument for school-choice takes on attractive features for those families affected (Peterson, 1990).

This political rationale for free market reform has proven appealing to inner-city African American families, and is credited with bringing about a rare example of common cause among segments of society that occupy opposite ends of the liberal-conservative continuum (Loomis, 1992). This evolving coalition of liberals and conservatives around the issue of urban school choice gave rise to several large-scale experiments of choice models. In 1990, Wisconsin became the first State to pass legislation authorizing private school vouchers. Other states such as Ohio followed their example and cities such as Milwaukee, Cleveland, Dayton, and others, implemented the experimental voucher programs. It is these early programs that today provide us with the evaluative data with which to judge the success of private school voucher models for the general education population.

As Wisconsin was the first state to enact private school voucher legislation in the new era of school reform, it was naturally the first state to have the constitutionality of its voucher law challenged. While the lower state court initially ruled that the voucher program violated the Establishment Clause, the Wisconsin Supreme Court overturned that verdict in 1998, and applying the three-prong test from *Lemon,* held the Milwaukee voucher program to be constitutional. Yet shortly after that ruling, the Ohio voucher program was ruled unconstitutional by the 6th Circuit Court.

The battle over the constitutionality of vouchers pursuant to the Establishment Clause of the federal constitution ended on June 27, 2002 when the Supreme Court overturned the 6th Circuit Court's decision in *Zelman*. In *Zelman* the Court ruled 5-4 that the *Lemon* test did not apply and that the constitutionality of the Cleveland program rested on three facts: (1) the program was neutral with regard to religion, (2) money flowed to religious schools only through the decisions of parents, and (3) the program offered genuine secular options to parents which are unaffected by constitutional questions.

The 1990s also saw the beginning of numerous privately funded voucher programs like the Indianapolis voucher program in 1991, Children First America in 1994 (CFA), and the Children's Scholarship Fund in 1998 (CSF). Unlike the experimental programs such as the one in Milwaukee, these voucher programs were privately funded.

Unhampered by the debates on the use of public funds, voucher programs such as CFA and CSF grew quickly and used private funds to operate dozens of affiliated voucher and scholarship programs around the country and provided tens of thousands of students with money for private school education.

Recent Development and Current Law

The years since the first experimental private school voucher programs began have seen increasing interest in voucher programs. Persistent reports about the inadequacies of public schools have created a climate friendly to reform efforts, and the Bush administration has shown itself to be strongly supportive of choice initiatives. By the end of his first hundred days, Bush had already signed legislation on education savings accounts (ESA) that allows parents and other individuals to invest, tax free, up to $2,000 annually per child for private or public elementary and secondary education. Previously ESAs were limited to funding higher education. Recently, the Bush administration included 756 million dollars for school choice programs and language in the omnibus budget bill to establish a pilot voucher program in the Washington, D.C. School District. The D.C. School Board reacted negatively to the proposal suggesting that the administration was imposing vouchers on the District without consulting the elected officials responsible for the education of students in the District (San & Strauss, 2003, p. 105).

Bush also signed into law the No Child Left Behind Act (NCLB). While the NCLB does not include true private school voucher options, it does include strong provisions supporting public choice options for children in failing and unsafe schools, funding for supplementary educational services for students in failing schools that can be used to pay either public or private service providers, and significant funding increases for charter schools.

Under Title I, section 1116(b)(E) of the NCLB, schools, beginning with the 2002-2003 school year must offer public school choice to their students if those schools are in their first or second year of school improvement, in corrective action, or in a planning year for restructuring. States are also mandated under Title IX section 9532 to develop new reporting requirements under school safety, and develop guidelines for identifying schools as persistently dangerous so that a school choice option can be extended for students who wish to transfer to a "safe" public school.[5] Students who are victims of a violent crime at a school must also be given a school choice option regardless of whether their school is classified as persistently dangerous. Finally, under section 1116(e) of Title I, school districts may allow low-income students who attend a school in its second year of school improvement to receive publicly financed supplemental services provided by public *or private* providers including faith-based organizations.

The choice provisions of the NCLB create challenges for states to come into compliance even with respect to children without disabilities. Students may not transfer into failing or persistently dangerous schools under a choice plan, but urban districts are likely to have limited space for transfer students in safe, high performing schools. Since

the mandate calls only for transfer within a District, small or rural Districts may face serious challenges due to a small number of available schools. Under some of the provisions of the Act, families may find themselves required to arrange and pay for their child's transportation after a choice option has been exercised, as for example, in the case of a child moving from a school under corrective action which subsequently makes progress and goes off the corrective action list.

Since children receiving special education are also students in general education, the NCLB also applies to students with disabilities. Implementation difficulties may be aggravated with respect to students who need special education services. In June 2002, Secretary of Education Rod Paige sent a letter to states and school districts providing guidance on meeting the choice provisions in NCLB with respect to students with disabilities. The letter states, "In offering choice to students with disabilities, school districts may match the abilities and needs of a student with disabilities to the possible schools that have the ability to provide the student (a full and appropriate public education)."[6] It goes on to state that schools chosen must be accessible and be able to implement the IEP drawn up by the previous school. The school of choice will have the option of convening a new IEP team and constructing a new IEP. The letter highlights the additional difficulties that parents and districts may face in providing "choices" for students with disabilities, and it also makes clear that the Bush administration intends to extend choice options to students with disabilities.

Intentions aside, it is Governor Jeb Bush rather than President George W. Bush who is leading the way in extending vouchers to students in special education. In 2000, Florida became the first state to create a voucher program specifically targeted toward students with disabilities. While other voucher programs, indeed Florida's own general education voucher program, have targeted specific groups (primarily based on income or location in a sub-average school), Florida's McKay voucher program is the first private school voucher program to provide funds only to students with disabilities. It is a statewide program that allows any child eligible to receive special education to apply for the program and receive a voucher.

Considering the comments about vouchers in the report published by the President's Commission on Excellence in Special Education (PCESE, 2003), the Florida program could well be considered as a model for any special education voucher plan introduced during the reauthorization of IDEA. We therefore pay particular attention to this program as we discuss the structure of voucher programs and their potential impact on students with disabilities in the following sections.

Constitutionality and the Future of Voucher Law

Voucher programs are on the rise, and the historically most significant barrier to their constitutionality, the *Lemon* test for violation of the Establishment Clause, has been replaced by the rule in *Zelman*. *Zelman's* test lowers the constitutional bar significantly and allows the majority of voucher programs to pass constitutional muster, at least with

respect to the Establishment Clause. For the few programs that may not meet the courts' test, *Zelman* clearly maps how they can be redesigned to address any constitutional shortcomings.

While *Zelman* has resolved the basic Establishment Clause dispute, the battle over the constitutionality of voucher programs is not yet over. Instead, the next battles will most likely be fought over state rather than federal constitutional provisions. Most state constitutions have provisions forbidding government establishment of religion, just as the federal constitution does, but over two thirds of state constitutions use language that is much more stringent than that of the federal constitution. Some even go beyond the establishment of religion argument to specifically say that government funds may not be used for any private school. Others prohibit spending public funds "in aid of" or "to support or benefit" any religious school, rather than simply saying the government cannot "establish religion." A final category of state constitutional provisions forbids the "compelled support of worship or [religious] instruction" or the use of state money "appropriated for or applied to religious worship or instruction."

These provisions in state constitutions provide local voucher opponents with additional ammunition against programs in their state. Indeed the Florida A+ voucher program (for regular education) has twice been ruled unconstitutional at the trial court level pursuant to the state's constitution. The first ruling was a summary judgment and was overturned and remanded for a trial on the merits. The trial on the merits again resulted in a finding of unconstitutionality, but the decision has been appealed.

Some challenges to voucher programs have already adopted this argument. In *Chittenden Town School District v. Vermont Department of Education*, a Vermont Appellate Court held the Chittenden School Board's extension of the state school choice reimbursement program to sectarian secondary schools violated Vermont's Constitution. It did not, however, base its decision on the establishment clause language, but on the compelled support provision in the state constitution that reads, "no person ought to, or of right can be compelled to . . . erect or support any place of worship . . . ." The Court reasoned that the issue hinged on "the choice of those who are being required to support religious education, not the choice of the beneficiaries of the funding." A Florida trial court reached a similar conclusion in *Holmes v. Bush*, ruling that the clear and unambiguous statement in the Florida constitution forbidding public aid to religious institutions precluded any finding of constitutionality. The State of Florida has appealed the decision.

One counter argument to these state constitutional challenges, that the state constitutional provisions themselves violate the federal constitution, is just beginning to be brought before the courts. This argument is based on the historical motivation behind the state constitutional provisions, or as voucher advocates refer to them, the Blaire Amendments. Blaire Amendments are state constitutional provisions that grew out of a movement in the 19th Century against an increasing Catholic population and private school system. Protestant hostility toward Catholics, it is argued, taints these provisions with federally unconstitutional animus. The probable success of this argument most likely

rests on the swing vote of Justice O'Connor since the four other "conservative" Justices (who with O'Connor formed the majority in *Zelman*) have already condemned such provisions.

Other challenges to voucher programs may be on the horizon based on structural elements of individual programs. For instance, voucher programs that do not allow religious schools to participate may be challenged as violating the first amendment right to free speech and free exercise of religion, but so far it seems unlikely that the courts will favorably receive this argument. In *Strout v. Albanese*, the Maine Supreme Court reasoned that denying participation of religious schools in their state choice program did not significantly burden the exercise of religious belief. The 1st Circuit Federal Court of Appeal agreed in *Bagley v. Raymond School Department* which held that parents had no right "to require the taxpayers to subsidize that (sectarian) choice."

Private sectarian schools may also challenge other choice programs by claiming that regulatory requirements on vouchers (to protect civil rights or provide accountability) create a state entanglement in religion and constitute a violation of the Establishment Clause (this issue was not addressed in *Zelman*, but was mentioned in the dissent). On the other hand, if the state tries to avoid this issue by exempting religious schools from regulatory requirements, non-religious private schools may claim that the exemption for religious schools is unconstitutional because it is no longer "neutral" as required in *Zelman*.

While these new structurally-based claims against voucher programs are open questions that the courts have not yet directly addressed, one result of these challenges is clear: they cannot invalidate all voucher programs, only ones with particular characteristics. Similarly, states that do not have constitutional restrictions that impose any barrier greater than the federal constitution are generally insulated from challenges based on state constitutional provisions by the rationale behind *Zelman*. The ruling in *Zelman* has changed the national legal climate with regard to voucher programs and left little doubt that at least *some states* can constitutionally enact at least *some forms* of a voucher program.

Special Education and Private School Choice

What is rarely recognized in most discussions about special education vouchers is that IDEA itself provides for the use of public monies to fund private school education in two specific situations: (1) when parents find an appropriate private program in response to a failure of the public school to provide one, and (2) when the IEP team agrees on a private school placement. Additionally, IDEA provides for limited supplemental services to children with disabilities in "voluntary" private school placements. While the "voluntary" placement provisions do not involve public funds being given to private schools, it is important to note these provisions because they apply to all children in private school settings and presumably would apply to children with disabilities employing vouchers.

IDEA's Three Levels of Choice

The IDEA requires schools to provide a free appropriate public education to all children with disabilities. If they do not, parents have the right to seek an appropriate education elsewhere. Courts require reimbursement to be provided to the parents for such "forced" unilateral placements if the court finds that the public school did not offer a child an appropriate education in the least restrictive environment and a private placement does provide an appropriate education. However, parents who choose to place their children in private schools unilaterally (without the consensus of the IEP team) take a risk in doing so. If the school district is shown in court to have offered FAPE to the student or the private school placement does not offer FAPE, then the parents must shoulder the cost of the private school themselves, not to mention their own attorneys' fees and court costs if they are not the primary prevailing party in any related court case.

While this provision of IDEA may seem similar to programs that provide vouchers to children in failing schools, there are some significant differences. First, vouchers are generally provided in such programs when the state finds that the school is failing. IDEA requires the parents to go to court and get a ruling that authorizes the use of the funds. Second, such voucher programs are based on school performance; IDEA individualizes the inquiry for each student. Third, vouchers are provided before the child is placed in the private school; under IDEA parents usually have to pay for the private school themselves and then seek reimbursement. Fourth, IDEA does not place a limit on where the parents may go to seek an appropriate education for their child when the public school has failed to do so. Instead, it merely requires that the parents prove the program is appropriate. Finally, IDEA doesn't place any monetary cap on the amount paid, though there is some indication that the courts would only approve expenses that seem reasonable given the situation.

IDEA also authorizes the use of private placements to provide FAPE, to the extent such placements are consistent with state law, when the IEP team agrees upon the private placement as the most appropriate and least restrictive placement possible. In other words, the IDEA does not prohibit states from authorizing the provision of services to private school children with disabilities, but still requires each placement decision to be done on an individual basis for each child by his or her IEP team. Such placements are considered to be "by the local school district" and therefore do not abrogate the local agencies' responsibility to provide FAPE.

The primary differences between local school district private placements and other proposals for special education voucher programs are: (1) the IEP team, rather than parents alone, holds the power of choice; (2) the public school district still has the primary responsibility to provide FAPE; (3) the private school must be chosen by the IEP team as a means for the public school to fulfill its requirement to provide FAPE and all IDEA substantive and procedural rights and requirements must still be met.

Finally, states must, to a limited extent, serve students with disabilities whose parents have simply turned down the local offer of FAPE and voluntarily enrolled their

child in private schools. The regulations provide that "each local education agency shall provide special education and related services designed to meet the needs of private school children [with disabilities] residing in their district." While this requirement sounds like a broad extension of IDEA into private school settings, it is only fully applicable with regard to the identification and evaluation of children with disabilities in private school settings. Other rights or entitlements to services under this provision are significantly limited.

There are several limitations on the general obligation of states to children who have been "voluntarily" placed in private schools. These limitations state that: (1) public funds are only available for supplemental services and not tuition, (2) the amount expended for provision of services to private schools is limited to a proportional amount of Federal funds made available under IDEA, (3) a public agency may elect not to serve all children in its district, (4) a public agency is not required to make the full range of IDEA services available to those it has elected to serve, and (5) "voluntarily" placed private school children are not entitled to FAPE.

The voluntary choice provision of IDEA is similar to a voucher program in that the state government has the power to allow or not allow private school choice and to select the limitations of such choices to students and schools meeting specific criteria. The IDEA regulations refer to such criteria as "eligibility." States may define the terms "eligible student" and "eligible private schools" to control which schools are available options for IEP placement decisions for which students with disabilities. Since federal funds provide only a small percentage of overall special education expenses, it is clear that Congress did not intend to create an entitlement to services for voluntarily placed students at private schools equivalent to that provided at public schools.

Obviously, students with disabilities who are voluntarily placed in private schools have a significantly watered-down entitlement compared to those attending public schools, placed in private schools by the local agency, or have the private placement "forced" upon them by the failure of the local agency. The basic floor of responsibility toward voluntarily placed students is, as stated by the Second Circuit Court, "that where the cost of special services does not vary with where they are provided, the IDEA and regulations regarding voluntary private school students make little sense if such services may be made available only in the public schools."

Constitutional Issues

One additional limitation placed on public funds for special education services provided to students may result from court cases on the Establishment Clause of the Constitution. Two of the Establishment Clause cases leading up to the landmark decision in *Zelman v. Simmons-Harris* dealt with challenges to the provision of special education services to students at private religious schools as allowed under IDEA. *Zorbrest v. Catalina Foothills School District* involved a constitutional challenge to IDEA based on provisions allowing a Tucson school district to subsidize a sign-language interpreter for a deaf student attending a sectarian school. In ruling the IDEA to be constitutional, the Supreme Court framed the issue as a matter of neutrality and parent choice. Since the

program at issue distributed benefits to any student with a disability without regard to the religious nature of the school and the interpreter was present at the request of the parents, it was a permissible use of public funds and did not involve the government in religion. The Court held similarly in *Agostini v. Felton* in 1985, which involved public school teachers providing special education services at private religious schools.

In response to the decision in *Zorbrest*, the reauthorization of IDEA in 1997 included a clarification that special education and related services could be provided on the grounds of private schools, including parochial schools. Despite the intentions of Congress in passing this amendment, the Supreme Court's jurisprudence with regard to the Establishment Clause still applies to IDEA funds expended at public schools.

In cases of "forced unilateral" private school placement, the parents by definition provide the choice mechanism by which the federal funds make their way to the private school and would probably be held Constitutional even with regard to placements at parochial schools. Similarly, the decisions in *Zorbrest* and *Agostini* argue strongly in favor of the Constitutionality of the provisions providing for supplementary services for voluntarily placed students, at least in most situations.

The same cannot be said for decisions by the IEP team to pursue a private placement for an individual with a disability if that placement is at a religious school. First of all, the placement would fail the test in *Zelman* because it is, at least in part, a decision of the local agency that moves the public funds to the private religious school. Second, the provision of FAPE would require intensive involvement (entanglement) in the operation of the private religious school and thus fail the test in *Lemon*

Application of Special Education. We have outlined the law and history of special education and vouchers. With this knowledge in hand, we can now examine the interaction between special education law (IDEA, Section 504, and the ADA) and voucher programs; but, to date, there are no court cases, federal statutes, or federal regulations that specifically deal with students with disabilities within the context of private school choice programs.

There are only three sources of information on how the law deals with students with disabilities in voucher programs. The first one, the Florida McKay Scholarship Program, was already discussed. The second source is guidance from the Department of Education in the form of letters of response to public inquiries. The final source is state voucher laws creating private school choice for general education children.

Guidance from the Department of Education. In response to an inquiry about Florida's special education scholarship program, the U.S. Department of Education said,

> "if the FDE (Florida Department of Education) and its local school districts have made FAPE available to eligible children with disabilities in a public school but their parents elect to place them in private schools through the Scholarship Program, then such children are considered 'private school children with

> disabilities' enrolled by their parents. Under IDEA, such parentally placed private school students with disabilities have no individual entitlement to a free appropriate public education including special education and related services in connection with those placements." Letter to Bowen 35 IDELR 129 (ED, March 2001)

There have not been any court cases nor is there any direct statutory language in either the State of Florida Statutes or the U.S. Code that provides any direct guidance on whether the requirements of IDEA follow the voucher money and the student to private school settings. The letter to Bowen is the only currently existing interpretation of this legal issue, but the courts will most likely follow the ED's interpretation if the interpretation is ever actually challenged.

The letter to Bowen also discusses the application of Section 504 and the ADA to private schools receiving vouchers in Florida.

> "As we understand it, . . . private schools are not recipients of Federal funds and their programs and activities are not federally assisted. Therefore, Federal civil rights laws, including Section 504, do not directly apply to the private schools participating in the Scholarship Program. Further, Title II of the ADA does not directly apply, as the private schools are not public entities."

The U.S. Department of Education interprets 504 and the ADA to not apply to private schools participating in the Florida McKay program. This interpretation for the McKay program was foreshadowed by another letter from the ED to then Governor Tommy G. Thompson of Wisconsin (Thompson letter) and concerned the Milwaukee voucher program. It said substantially the same thing as the Bowen letter.

In the Bowen letter the ED puts three caveats on the inapplicability of Section 504, the ADA and IDEA. First, it notes that IDEA includes a process through which limited special education services may be provided to students with disabilities in private schools.

Second, the ED says that Section 504 and the ADA apply to the *State's administration* of its voucher program. Administration would potentially include eligibility, funding, monitoring (if done by the State), information and dissemination, and maybe even admission standards. The Bowen letter goes on by way of example to say that "under Section 504 and Title II of the ADA, the SEA (State Education Agency) must ensure that participating private schools do not exclude a Scholarship Program student with a disability 'if the person can, with minor adjustments, be provided an appropriate education within the school's program.'" 34 CFR C 104.39(a). On the other hand, the State would not be required to ensure that participating private schools provided a free appropriate education to students with disabilities in the least restrictive environment if the schools do not offer programs designed to meet those needs. See 34 CFR Part 104, App. A at 28.

Finally, the ED prefaces the inapplicability of IDEA by saying "if the FDE (Florida Department of Education) and its local school districts have made FAPE available to eligible children with disabilities in a public school...." This suggests that parents who choose to apply for the McKay Scholarship program because they do not believe the public school has provided their child with a Free Appropriate Public Education may still engage in due process procedures and, if successful in proving that (1) the public school did not provide FAPE and (2) the private school does, receive reimbursement from the school district for any additional education costs incurred as a result of the public schools failure to provide FAPE. If the voucher covers the entire tuition cost, this may be a nominal sum; but if the voucher only covers part of the tuition and related costs (such as an aid provided at the parent's expense) than those monies can be recovered.

We started out by saying that vouchers can affect students with disabilities in three ways: as general education students in general education voucher programs, as students in public schools in districts where vouchers are available, and as students receiving vouchers from programs designed specifically to offer choice to students with disabilities. With respect to the law of special education, there is little doubt that students with disabilities using a general education voucher will not be able to call upon their IDEA rights in a private school setting. They may, however, have certain rights in the administration of the voucher program. Voucher programs for general education must not be discriminatorily administered to children with disabilities.

On the other hand, the law says almost nothing about the rights for children with disabilities with regard to voucher programs in which they are not participating or may even be trying to participate. Whether or not such programs drain funds from the public school coffers, the requirements for the school to provide a free appropriate education to all students with disabilities remains the same.

Individuals in voucher programs designed for special education would generally retain the same legal protections afforded to individuals with disabilities in general education voucher programs, but there would be some differences in the effect of the law if not its applicability. For example, it would be nearly impossible to prove discrimination against individuals with disabilities in a program designed exclusively for that same group, though discrimination could still occur against children with certain disability classifications (ADHD, SED, Autism, etc.).

Types of Free-Market Models of School Reform

To thoroughly examine the legal and policy issues surrounding state voucher programs and special education, it is important to recognize that there are many different ways in which a voucher program can be organized. As previously mentioned, the different structures, policies, and procedures that comprise each existing and potential voucher program have a profound effect upon both legal and practical issues for that program. Different structures produce different legal issues and may also produce significantly different outcomes. To recognize these differences, and their affect upon

special education law and children with disabilities, it is necessary to discuss the different types of voucher program and the different qualities that voucher programs may or may not incorporate.

Various attempts have been made to categorize the variety of school choice programs offered or suggested. David Smole of the Domestic Social Policy Division of the Congressional Research Service identified six categories of school choice in an Issue Brief for Congress (Smole, 2002). These are: 1) intradistrict public school choice (i.e., magnet schools, alternative schools); 2) interdistrict public school choice (i.e., special high school districts); 3) Charter Schools (non-LEA operated; self-contained LEA charters; online "virtual" charter schools); 4) Tax Subsidies (i.e., federal Coverdell ESAs; school tuition organizations that provide "scholarships"); 5) subsidies to private schools (i.e., contracted schools for special services, from Districts); and 6) School Vouchers and Supplemental Education Services (vouchers that can be used as full or partial tuition payments in private schools). Only the last three of these options provide a means by which public funds are expended for private school education, or in other words, constitute a form of private school voucher program.

There are significant differences among the voucher programs discussed so far, but there can also be significant variation among programs in the same category. Levin (1990) for example, suggests a further distinction should be made between "market choice" models and "public choice" models. A market choice option provides vouchers for access to private schools. Public choice systems offer choices within the public domain, either within or across districts. Levin argues that public choice models better reflect the Deweyian ideal of social benefits for all, while the market choice model affords greater private family benefits. The natural tension that exists in a democracy between private benefits and the common good affords some emerging standards against which to evaluate school-choice programs independent of evidence for enhanced achievement or school improvement resulting from competition. Levin (1990) writes, "Clearly a voucher plan with 'compensatory' vouchers for the poor, no 'add-ons', extensive provisions for transportation and information, and regulation of admissions to assure participation of the poor will have vastly different consequences than one which provides a uniform voucher with parental 'add-ons', a poor information system, no transportation, and a laissez-faire approach to admissions" (p. 260).

It is clear that no system of categorization can truly accommodate the existing and potential variety of school choice programs. Therefore, instead of creating a system of categories, the range of possible structures and characteristics of various programs should be identified and examined so that any voucher program, existing or proposed, can be evaluated based on its structural characteristics.

The Structural Characteristics of Voucher Proposals

We have identified fifteen structural characteristics based on the literature that will significantly affect the legality and/or efficacy of a voucher program. These fifteen characteristics can be organized into five questions: (1) Who can participate? (2) What

are the choice options? (3) How is funding handled? (4) What are the accountability measures? And (5) how does it address barriers to successful implementation? We now outline each of these questions and the possible structural characteristics that answer them.

Who can participate?

The question of who can participate applies to both students and schools. Most voucher programs have eligibility criteria for both prospective students and schools. Program participation can also be limited to a certain number of students. Who participates and how many participate, along with the criteria for eligibility, are the defining characteristics of a voucher program.

Student Eligibility. Besides the basic requirement of state or local residency, many voucher programs including those in Cleveland, Milwaukee, and Florida, have additional criteria for student eligibility. These programs are thus targeted at particular groups, usually those who are in at-risk populations or localities. Cleveland and Milwaukee, for instance, only provide vouchers to low income families (200 percent of the poverty level in Cleveland; 175 percent in Milwaukee). Florida's A+ program, on the other hand, provides vouchers only to students in schools that have received an "F" rating twice in the previous four years. Targeted programs such as these attempt to promote social equity by providing vouchers only to those who need them most. Other examples of targeted voucher programs include those in Maine and Vermont that provide reimbursement to families who live in districts that do not have a public school system.

Florida's McKay Scholarship program for students in special education is the only voucher program specifically targeted to students with disabilities. Though it is unarguably a "targeted" program since only children who need special education services can qualify, it shares many similarities to universal systems in that all students with disabilities throughout the state are eligible. This also makes the McKay voucher program surprisingly large compared to most targeted voucher programs currently in existence. In its first year, the McKay program boasted 4,997 participants, more than the combined enrollment in the Cleveland program (4,457 participants) and the Florida A+ program (70 participants). It presently serves 8,644 students at a cost to taxpayers of $54.7 million (East, 2003).

Universal voucher programs, on the other hand, also have its proponents, such as Milton Friedman. Universal voucher advocates argue that targeted programs provide only limited motivation for private school involvement, create only limited competition, and thus, provide only limited benefits. Universal programs sometimes take the form of tax credit programs for educational expenses rather than true school vouchers, such as the non-refundable individual tax credit in Illinois for 25 percent of educational expenses over the first $250 spent at any public, private, or home school. The credit provides a maximum of $500. Minnesota has had a similar tax deduction since 1950 that provides up to $1,625 for students in grades K-6 and $2,500 for students in grades 7-12.

School Eligibility. For every voucher, there must be a place to spend it. Therefore, schools must be willing to participate in the program. Constitutional issues about religious schools, questions of effectiveness, and a need for adequate school enrollment drive the creation of criteria for schools that wish to participate in voucher programs and accept voucher students.

While *Zelman* has put to rest the primary reason for excluding religious schools from participation in voucher programs, state constitutional issues still may motivate some states or districts to limit vouchers to private schools with no religious affiliation. The Milwaukee program originally did not allow religious schools to participate, and the program in Maine still only includes nonsectarian private schools. Yet the constitutional issues may bite both ways as the possibility exists that private religious schools will challenge programs that "discriminate" against them.

To date the questions of effectiveness of private schools that wish to enroll have generally been limited to questions of capacity and convenience. With no proven system in place to monitor or rate the effectiveness of private schools, most voucher programs focus on whether the school takes children from all grades and whether it is within the local or a neighboring school district. In the more established programs such as the one in Cleveland, certain prior year attendance requirements also apply.

The Milwaukee program requires each participating private school to meet one of four basic standards: 70 percent of students advance to the next grade level each year, 90 percent attendance rate, 80 percent of students demonstrate significant academic progress, or 70 percent of families meet parent involvement criteria. Obviously, it is not very difficult for schools to meet only one of these standards. Other than these meager efforts, the need to ensure that public schools that participate are good schools seems to be left to market forces such as parent discretion in most programs.

The Florida A+ program potentially goes the farthest of any existing voucher program in requiring eligibility requirements in that it subjects private schools to standards adopted by a nonpublic school accrediting body which determines the strength and effectiveness of its accountability provisions. The Florida program also requires schools to demonstrate "fiscal soundness" in an effort to address concerns about private schools going out of business and thus creating high levels of transfer among schools. These types of accounting requirements have become more popular among voucher programs. The McKay program also requires fiscal soundness, but does not specifically require submission to standards of an accrediting body.

The need to have an adequate number of schools participate is probably still the most formidable factor influencing questions about school criteria in voucher programs. This is particularly true with regard to the participation of secular schools. *Zelman*, after all, requires "real" secular choices be available for a voucher program to be constitutional. *Zelman* also suggests an easy way of padding the secular choices available to families if there are not enough private secular schools available: allow the vouchers to

be used at other public schools. Another method of ensuring secular options is to provide the option of a voucher for supplemental services such as in the NCLB.

Maximums. Concerns about limited resources and the high fixed costs of public schools have resulted in limitations being placed on the number of students allowed to participate in many voucher programs. Maximum enrollment limitations help to address fears that voucher programs will drain the coffers of the public schools or put a heavy burden upon taxpayers. Cleveland's program depends upon the amount allocated by the legislature. Milwaukee's allows no more than 15 percent of the total enrollment at public schools to utilize vouchers. Other programs such as Florida's A+ program, the McKay Scholarships, and the voucher programs in Maine and Vermont are limited only by the special circumstances they require for eligibility.

What are the choice options?

Maximums completely remove the availability of choice based on the voucher program for those who are not allowed to enroll. This question deals with a similar issue: what are the limitations on choice for those who qualify and are allowed to enroll in the voucher program? There are three ways in which choice options may be limited. First, what alternatives are provided or, in other words, what different educational options are available to choose from? Second, who determines whether the student is admitted to a private school? Finally, how mobile are the vouchers or what geographical limitations are placed on available choices?

Alternatives. As previously mentioned, students must have schools at which to spend their vouchers and sufficient secular choices must be available if a voucher program is to meet the requirements of *Zelman*. While eligibility is one way schools can be convinced to participate, overall availability of alternatives is also determined by things such as location and the voucher funding mechanisms (particularly how much and whether parents can add on to the voucher amount). Other methods that states may use to increase available alternatives include allowing vouchers to be used for public as well as private school choice programs, allow vouchers to go toward educational expenses for home schools or supplementary services, provide tax credits or other legal/financial incentives to attract new schools, or simply increase the number of children in the program and thereby increase the market incentives for schools to participate.

The availability of schools to participate in a voucher program is one of the main reasons vouchers are touted as addressing urban rather than rural school quality issues. Schools in rural locations are unlikely to have the populations to support extensive choices among public and private schools. On the other hand, the reimbursement programs in Maine and Vermont apply mostly to rural school districts that are too small to provide any public school options. They provide choice by simply ignoring the potential geographical and transportation barriers to a sufficient number of educational options and instead attempt to create real choice by allowing parents to seek educational services from practically any source. It is likely that for practical reasons, families limit their selections to schools that are nearby the communities in which they live.

Admission. Traditionally, private schools select the students to attend their schools from available applicants. This free market ideal, however, is a common concern among voucher critics because it leaves the door open to segregation and discrimination. If admission is determined solely by the private school, schools could openly discriminate against voucher students on the basis of religion, intelligence, English proficiency, behavior, economic status, sex, and potentially even race or nationality.

Free market proponents would argue that the homogeneity of some private schools provides families with a wider range of options sensitive to particular cultural or educational preferences, and admission standards will respond to the market incentives provided by vouchers to provide good school options for all groups of voucher students. This argument is not very convincing with respect to individuals with severe disabilities, unless their voucher amounts adequately reflect the costs of addressing each child's needs. Another suggestion for retaining the broad range of cultural and educational options created, in theory, by selective admission is to allow a small percentage of participating schools to register for a voucher program as a specialized school with particular admission requirements. Under this approach the majority of schools would still not be allowed to determine their own admission standards.

If protections against discrimination in the admission of voucher students are established, what form should they take? In Cleveland, Milwaukee, and Florida (A+ program) eligible students apply for admission with respect to the number of slots made available by each school. Students to fill those slots are then randomly selected from the eligible applicants for each school. Another option is to require schools to accept a certain proportion of students from selected demographic groups.

While random admission or demographic selection may eliminate certain kinds of discriminatory practices and protect some groups, voucher programs such as the one in Cleveland still explicitly allow "any school district board operating any schools on Oct 1, 1989, admission to which was restricted to students possessing certain academic, athletic, artistic, or other skill, may continue to restrict admission to such schools." Discrimination on the basis of ability doesn't receive the same amount of protection as discrimination based on race, religion, or ethnicity. Schools that wish to institute new restrictions (after Oct. 1989) may still do so if the state board of education finds that the restriction will "generally promote increased educational opportunities" for students in the district and not "unduly restrict opportunities" for others. Such provisions create concern about the sufficiency of the "choice" offered to students with disabilities and whether they are receiving an equal opportunity to participate in the program.

Neither method is used in the McKay Scholarship program. The McKay scholarship program allows schools to exclude applicants that they are not equipped to serve. It allows schools to specialize in particular categories or classifications of disability such as blindness or autism and to only accept students who have those disabilities. This approach seems to fly in the face of past special education efforts to implement the LRE requirements of IDEA, by integrating children with disabilities into

regular education schools and classrooms, and developing policy in favor of non-specialized and inclusive schools.

Mobility. Another factor that limits choice within a voucher program is the geographical limitations on the use of the voucher. Some programs, such as Cleveland's limit the use of vouchers to private schools within a particular district where the eligible students are located. Others, such as the reimbursement program in Maine allow parents to choose any school inside or outside of the state as long as it is "approved." While greater mobility expands choice options, it can also send funds out of a district, thereby hurting the community in which the school is located, especially if it is already economically underdeveloped.

Funding

A potentially limiting factor itself, funding in a market driven system is a key factor in motivating participation and creating options. The method by which the funds are transferred can also affect the legal status of the program as well as the options of participants. Funding is characterized by the amount of the voucher, the method of payment, and the sufficiency of the payment.

Amount. The most basic question about voucher programs is how much should each voucher be worth? The free market answer is to determine a standard amount for all eligible children based on the average amount of money needed to provide each child an education. This is a fairly common approach among existing programs. Milwaukee's voucher program provides a standardized amount and Florida's A+ program provides an amount based on district per-pupil costs. Both programs limit the voucher amount to no more than the cost of tuition at the private school, but this requirement seems rather pointless considering the motivation for private schools to increase their tuition level to the maximum allowed by the voucher, if indeed their tuition is lower than the maximum to begin with.

As a practical matter, this system has some potential problems. Children do not all have the same educational needs, so a standardized voucher amount based on average educational costs will not accurately reflect the educational costs for individual children. This imbalance creates financial risk for private school participants who must either (1) control admissions to guarantee a positive voucher-cost ratio, (2) accept a large enough number of voucher students to average out the individual costs, (3) admit a high enough number of non-voucher students who have low educational costs to offset the risk posed by the voucher program, (4) simply accept the risk of participation in the voucher program, or (5) provide only a standardized level of educational services to meet the needs of the average student. One other option for schools worried about the financial risk is, of course, to not participate.

The financial risk for private schools accepting students with higher educational costs is particularly high with respect to children with disabilities whose educational costs are much greater than that of the average general education student. These questions have

fueled the concern that option 1, above, will be chosen by schools and result in discrimination against children with disabilities in voucher programs. Option 5 is potentially even more damaging to students with disabilities who could not be provided an appropriate education by a standardized level of services.

To address these concerns, voucher programs could provide additional dollar amounts to children who need special education. Additional amounts could be based on identified student needs, individual disability classification, or be standardized for all students who need special education. The Cleveland program adopts this strategy and increases voucher amounts for students with disabilities by 100 percent of the actual costs of additional services as determined from prior public school expenditures. Other suggestions have included the creation of a sliding scale for the value of vouchers based on family income. This would, in theory, offset concerns about schools limiting admission to children from high-income families, but would not address discriminatory practices based on voucher amount/educational cost ratios directly.

Another approach would be to address these concerns by prohibiting discrimination or admission standards and holding private schools accountable for providing an appropriate education to students with disabilities who select their school. This strategy involves regulation of the private schools involved in the program, but has still proved an appealing option for many voucher programs. The Milwaukee program requires schools to comply with federal civil rights laws, as does the A+ program in Florida. Wisconsin specifically prohibits discrimination on the basis of race, ethnicity, or religion (but not disability) in addition to providing more extensive funding for children with disabilities.

The amount of each voucher is particularly important with respect to the market theories that support the creation of voucher programs. The amount of the voucher should not only be sufficient to allow some children the option to attend existing private schools, it should be large enough to stimulate the creation of new private schools (or expansion of old ones) that will provide more choice options for a greater number of students. The seriousness of this concern about the high voucher rate required to attract a sufficient number of providers is starkly demonstrated in Milwaukee. The voucher provided to Milwaukee students in 2001-2002 had risen to $5,553 per student. This amount is more than enough to meet the standard tuition at most of the private schools in the city. Yet there is little evidence that any new private schools are being created. There were only 106 schools accepting vouchers in the 2001-2002 year from over 10,000 students. The limited supply of educational options has forced the Milwaukee program to limit the number of students participating and presents a significant barrier to expanding the program in the future.

The Florida McKay program has a much better ratio of participating students to participating schools. In 2001-2002, the 4,997 students accepting McKay vouchers had 357 schools to choose from. It could be argued that the increased choices result, at least in part, from the amount of the McKay voucher. The McKay vouchers are equal to the lesser of either the funding amount that has been determined to be necessary for an

appropriate education at a public school or the cost of the private school tuition. This argument seems misleading though since the ratio of students to schools is largely due to the program applying statewide. Thus, the actual choices of students who need special education services in a particular area are probably much more restricted than the numbers suggest. Furthermore, the McKay voucher is limited to the amount of tuition charged by the private school and thus may not reflect the actual cost of providing an appropriate education. Once more, schools will be faced with the aforementioned five choices to address such fiscal risk, at least to the extent each option is allowed by the program.

Payment Method

Since *Zelman*, how the public funds are used to create private school choices is a vital issue. The second part of the *Zelman* test requires the funds to be provided to the parents rather than directly to the school. Parental choice as the vehicle for funds transfers to private schools provided the basis for the Court distinguishing the case from those that fall under the *Lemon* test. If a voucher program provides funds directly to schools, the *Zelman* decision will not uphold its constitutionality.

The payment method also affects who benefits and how much benefit they receive from the choice program. There are several existing payment methods that can be utilized in a voucher program: individual tax subsidies, tax incentives for private donations, direct payment to schools, vouchers, and family reimbursement.

Tax subsidies include deductions, exemptions, or credits. A deduction allows the family to subtract qualified educational expenses actually incurred from their total taxable income. This approach tends to favor those in upper income brackets for whom the value of a deduction is substantially more. Although these inequities would not exist as much in a low-income targeted program, the deduction would also provide only a minimal benefit for such individuals or no benefit at all if the family had no taxable income. Tax exemptions are similar to tax deductions and allow families to invest income in the future education of their children such as in education savings accounts that exempt the money invested, and the interest earned on such money, from income tax requirements. As with deductions, families must first have money to take advantage of such programs.

Because of these inequities, most existing tax subsidies for education provide a tax credit rather than a tax deduction. A tax credit relieves the taxpayer's final tax burden equal to a flat dollar amount independent of income amount. Tax credits, while more equitable than deductions, may still fail to assist families who do not make enough to incur a tax burden unless they are refundable, in which case the credit amount will be granted in the form of a tax refund even if the family does not owe any taxes.

Another tax based approach to facilitating school choice is to encourage investment in privately funded voucher or scholarship programs by providing a tax deduction or credit for either organizations that provide vouchers or individuals and

corporations who donate money to organizations that provide vouchers. Arizona and Pennsylvania both have tax credits for the latter type of contribution. This method of facilitating school choice does not actually involve a publicly administrated voucher program, but rather, the expansion of privately run voucher and scholarship programs by encouraging donations by individuals and families who in turn receive the tax deduction or credit. This method can have the same advantages and disadvantages as other tax based methods, but also allows very little state oversight or control over the program. Regulation and accountability become more difficult though not impossible. Some would even criticize such programs as "stealth vouchers," or in other words, a program that expends tax revenues to support private school education, but does so in a manner that most members of the public do not recognize as a voucher-style program. Tax programs to help fund private school vouchers often manage to avoid the controversy of direct voucher programs by staying below the public radar.

Of the various public program approaches, direct payment to private schools has the most serious constitutional problems if sectarian schools participate because it does not meet the second part of the *Zelman* test. On the other hand, it is the most efficient system to administer because schools can simply report the number of enrolled voucher students (with proper identification of the students and proof of their "choice" of enrollment) and receive a check from the state equal to the per-child amount for all the children enrolled at that school.

Family reimbursement is another legally secure method for payment since the state pays the parent rather than the school, and the family uses its own money to pay for the private school education. On the other hand, this system risks a certain amount of inequity since some parents may not have the money to pay tuition at some schools while waiting for state reimbursement.

The use of vouchers solves the inequity problem possible in some reimbursement systems by providing the voucher amount up front, but is somewhat less efficient than either a direct or reimbursement system because communications (including transfer of funds, eligibility documentation, enrollment information, etc.) between families, schools, and the state must be more extensive. Some voucher programs, like the one in Cleveland, combine direct and voucher approaches to improve efficiency while still meeting constitutional requirements. Such programs send checks to each school for each voucher student enrolled, like a direct program, but the check is made out to the parents of the enrolled child rather than the school who must then have the parents endorse it over to the school.

Sufficiency (Add-Ons). Another important funding question with regard to voucher programs is whether families are allowed to pool voucher amounts with their own funds to afford the tuition at private schools that the voucher alone would not cover. These add-ons can increase private school choices for parents who have a little of their own money to spend as long as the school eligibility requirements are otherwise met by the school. Yet, add-ons create benefits to those with additional financial means that are not available to families who must rely only on the voucher amount to pay tuition and

related expenses, and thus, are often considered inequitable. Therefore, many programs require participating schools to accept vouchers as complete payment of all educational expenses for attending that school.

What are the accountability measures?

A topical concern in the current educational reform atmosphere, accountability for the efficacy of the system, is also one of the most commonly voiced concerns about vouchers. Since private schools are generally unregulated, how can the success of the program be assessed and how can fraud be prevented? Usual methods for accountability include monitoring of schools, enforcement of standards, and due process rights for students and their parents.

Monitoring

Once a voucher program has been initiated, participating families as well as the state must be able to determine whether the voucher program as a whole is effective in providing educational choices to families and whether each participating school is effective at improving educational outcomes for students. Some form of monitoring or assessment must therefore be included in the voucher program to determine its efficacy.

The free market enforcement model, discussed more below, argues against any form of government regulation involving monitoring and assessment. The free market model perceives the strength of private schools and voucher programs to flow from their freedom from wasteful and limiting government regulation. Instead of regulation, free market advocates believe that the market will encourage private schools to disclose data reflecting the efficacy of their program as a means of attracting prospective students.

Others are skeptical of market driven disclosure since the motivation to draw students into their programs forces private schools to engage in marketing efforts rather than to provide actual reliable disclosures. For example, an independent report on nine for-profit public schools in Baltimore said, "no one—not EAI [the corporation running the schools], nor the union, nor personnel, nor city officials, nor the evaluators—had clear benchmarks to assess progress and contract compliance." EAI's own informational booklet, on the other hand, was titled "Promises Delivered: How Education Alternatives Inc. Transformed Baltimore's Troubled Schools."

Some suggestions for regulatory methods of monitoring programs and schools include reporting how voucher money is spent (including per pupil amounts), requiring the use of state certified instructors, reporting student scores on standardized tests, assuring compliance with the Americans with Disabilities Act, and meeting state requirements for health, safety, and curriculum. Other approaches are less direct and require setting up a council to determine both eligibility of schools to participate and to develop standards for monitoring school outcomes and efficiency.

Enforcement. Whatever system of monitoring is adopted, standards must be enforced when they are found to be out of compliance. The free market approach to enforcement is merely consumer choice. If schools perform badly, parents will take their kids elsewhere and the school will lose that income. While this sounds good in theory, do the businesses upon which the free market enforcement approach is based really improve the quality of their products as a result of loss of market share and a decline in profits? As often as not, businesses will respond to economic pressure by cutting costs, restructuring management, reducing services, or implementing a new market strategy rather than improve their "product." Can we expect schools to behave differently? Market motivations are directly based on the financial success of the school and only indirectly based on the educational success of its students. The actions of the school will therefore be focused on the "bottom line" in a free market. When the investment in the educational improvement of students does not have a positive cost-benefit ratio, schools will not institute improvements. For a voucher system to work, there needs to be a very strong connection between financial and educational success. Such a connection has not been adequately shown.

The other common alternative of free market accountability, or more accurately a commonly suggested supplement, is to require certain outcomes for continued participation in the program. This approach would combine with a standardized monitoring system to measure one or more success criteria at each school, and "expel" failing schools from the voucher program. Alternately, voucher amounts could be reduced for schools that are not achieving specified standards or outcomes, but reducing funds is more likely to reduce the efficacy of such schools than improve them. A more positive approach would be to reward successful schools with bonus funds distributed based on yearly assessments of the specified criteria. The criteria could be any of those that can be monitored: teacher certifications, student achievement on assessment, post-secondary school enrollment of graduates, etc. Such positive accountability measures could also be broken out by specific targeted groups such as low-income students or students in special education.

Parent/Student Rights

Public schools have long extended limited rights to families, such as rights to access their educational records and have their confidentiality respected. Private schools are bound more by contract than regulation, and thus, may not extend the same rights to students that public schools do. For instance, a private religious school may require enrollees to participate in a morning prayer or forbid prayer by other denominations upon school grounds. Such freedom of religion is guaranteed by law in public schools, but is not required in private schools that may in fact be set up specifically to promote particular religious or philosophical beliefs. Should the state require schools that participate in a voucher program to extend any rights to parents and students? What about a basic right to a safe learning environment that meets the state health code standards?

True free market advocates say no. They would again rely on the market to ensure that no one would be limited to choices at schools that discriminate against them and that

parents/students were extended any rights important enough to weigh in on their choice of school and thus affect the market. This argument, as with many others from the pure free market theorists, seems to ignore the inequities that have existed in the past despite any market motivations to the contrary. Organizations are made of people and people care about things other than the bottom line even if the organization as a whole does not.

Furthermore, these theories put a lot of faith in the existence of enough market pressure to influence school systems. Parents will choose schools based on a variety of factors; parental rights are only one factor and may not be sufficiently determinative to influence the free market. We cannot even say how many people think about the existence or non-existence of their rights when choosing a school. People tend to only think of their rights when they feel they have been wronged. The free market has failed in this regard many times in the past, most notably in the areas of employee rights and landlord tenant agreements. Both of these situations eventually resulted in highly regulated programs to protect the rights of individuals who supposedly wielded the power of choice within the unregulated free market.

Most voucher programs have responded to some of these concerns by requiring basic adherence to health and safety laws. Others, such as the Milwaukee program, have addressed religious discrimination directly by explicitly stating "a private school may not require a pupil attending the private school under this section to participate in any religious activity if the pupil's parent or guardian submits . . . a written request that the pupil be exempt from such activity." The Cleveland program generally forbids discrimination on the basis of race, religion, or ethnic background (but not disability) as well as any practice that fosters unlawful behavior or teaches hatred against such groups. The Cleveland program also requires private schools to accept transfer credits toward graduation requirements. On the other hand, schools participating in the Cleveland program are specifically allowed to focus on serving only a single gender.

Yet in comparison to the IDEA, these substantive rights seem fairly insubstantial. There are currently no voucher programs that explicitly provide administrative or judicial remedies for breaching these duties though parents would presumably have standing to challenge a private school's adherence in state court.

How does it address barriers to successful implementation?

Almost all public service efforts can be derailed by one of three common barriers to the successful delivery of services. First, information must be available and adequate to support informed choice. Second, those who participate must have some means of transportation to get to their school of choice. Finally, discriminatory barriers must not prevent specific classes of eligible participants from enrollment in the program or receipt of its benefits.

Information

As previously discussed under monitoring, information must be available to parents that allows them to exercise informed choice among available schools. Even if monitoring provides adequate data from which to make such assessments, parents must (1) have access to such information and (2) must be able to understand what the data mean. These are significant hurdles. What form of dissemination does the voucher program require? Is the information provided in alternate formats and languages?

For example, the Florida Department of Education maintains a website that lists which private schools are participating, but does not give any assessment information on the school except for (1) its religious affiliation, if any, (2) a one word description of the program (regular, coeducational, etc.), (3) whether it is for- or non- profit, (4) whether it participates in the school lunch program, and (5) the grade levels served. Furthermore, only the "breaking news" section of the website seems to be available in Spanish, and the website is neither Bobby compliant nor W3C compliant. It is, therefore, doubtful whether individuals for whom English is a second language or who have disabilities will be able to access even this basic level of information about the program. Even for those who can access the Florida Department of Education's website, it is unlikely that they will be able to make an informed decision about participating in the voucher program or selecting a good school based on such sparse information.

The law authorizing vouchers in the Florida A+ program does not contain any provision requiring any greater disclosure than is on the website, though all parents who have students in failing schools must be notified of their eligibility for the program. As a pro-voucher Florida website says, it is assumed that parents "will learn about a particular school ... by visiting the school, by talking to other families, by finding out how well their students are learning and behaving, etc." In the Florida A+ program, parental choice means parental responsibility to ensure that it is an informed choice.

For Florida families who have internet access, finding such information might not be too difficult thanks to Florida Child and their link to GreatSchools.net which provides extensive information about Florida schools, both public and private. Other families, if they know these websites exist, might use Internet access provided by a local library to investigate participating schools, but may otherwise have to rely on word of mouth or what could be very time-consuming visits to multiple schools to find a program. It should also be noted that the GreatSchools.net Web site is exceptional in both its design and content compared with other online resources about city or state voucher programs. Other voucher programs offer significantly less online information on participating schools and their sites are more difficult to navigate. GreatSchools.net should also be commended for making its site available in Spanish as well as English (additional languages would improve it even more). It is not, however, Bobby or W3C compliant so some individuals with disabilities will still have difficulty accessing the site, and it does not offer extensive information on the McKay scholarships or rate schools that participate in the McKay program.

Lack of dissemination seems to be a weakness of many voucher programs and undermines the ability of parents to make an informed choice and help support the market

theory upon which vouchers rest. To address this problem, voucher statutes could require public schools to disseminate more information for parents who are choosing to leave their public school, require annual publication of standardized information by participating schools (available upon request), or create a centralized hub for information and provide extensive notice about access to the information hub.

Transportation

Distance is a common barrier to receipt of services in many fields. If the family needing services does not have transportation to the point of delivery, than they cannot receive the services. The same is true for schools and education. Students need to be able to get to any school they choose. If transportation is limited or distance and cost are too great, choice is limited.

Voucher programs have three basic choices for dealing with transportation: (1) the public school provides transportation, (2) the private school provides transportation, or (3) the parent is responsible for providing transportation. It should be fairly obvious that number three may result in a practical limitation on the choice of low-income families. Yet, the Florida programs, both the A+ and McKay scholarships do not provide transportation to voucher students, despite being the only statewide voucher programs currently in existence. The other two options for dealing with transportation involve cost issues that in the current budget climate could cause significant financial difficulties for either the school district or the private school.

There are also some compromises between these two options, like having the parent pay for transportation based on a sliding scale with the receiving school shouldering any additional cost. A sliding scale would help ensure access by low-income families and also relieve at least some of the cost for the school but still may be difficult for private schools that do not normally provide transportation. Other creative options and compromises should be considered to address this geographic and fiscal barrier for any proposed or existing voucher program.

Civil Rights

Some barriers to service provision are not as tangible as information and transportation, or are exacerbated by disability. These are the barriers that explicitly or functionally exclude members of specific groups through the use of discriminatory policies, practices or procedures. In an age of school choice, the question becomes whether the program will protect individuals with disabilities from such barriers in the administration of the voucher program and in private school settings.

A foundational question about civil rights, vouchers, and students with disabilities is whether students who need special education services will be eligible for vouchers in a program designed for general education students. Admission, covered previously, provides another venue for discrimination that private schools might use to exclude children with disabilities. There are other civil rights issues connected to the structures

we have already discussed and that hold special significance for individuals with disabilities: the sufficiency of funding to cover special education services; special transportation needs; wheelchair access and universal design of facilities; alternate formats for information; and monitoring that examines special education outcomes as well as overall school outcomes.

Furthermore, before the passage of IDEA, students with disabilities were commonly expelled from schools for behavior problems. While some would still argue, fairly convincingly, that this practice is still widespread, IDEA now carefully regulates suspension and expulsion to prevent discriminatory exclusion and requires schools to continue to provide services to students with disabilities even if they are moved to an alternate education setting or are under long-term suspension (though not during short-term suspensions that do not result in a change in placement). While it may not have eliminated such exclusionary tactics, IDEA reduced the incidence of them significantly. Will similar protections be extended to students with disabilities who utilize vouchers?

Voucher programs can include various provisions to extend protection to children with disabilities in private schools. For instance, voucher programs can require private schools to abide by state anti-discrimination laws or require a specific assurance from participating schools that they will not discriminate against individuals with disabilities. A specific assurance is probably the weakest form of protection as it will most likely lack details about reasonable accommodations, removal of educational barriers, and other specific provisions that would broaden the scope of the protection and provide substantive requirements that serve as benchmarks of a nondiscriminatory school. Holding private schools accountable for complying with state or federal disability laws (that would not normally apply to their operation) would address some of these concerns.

Additionally, voucher programs could incorporate aspects of the state and federal law with regard to special education. For instance, they could extend the right to an "appropriate" education to all students with disabilities in private schools or require students with disabilities be educated in the least restrictive environment. So far, there are not any voucher programs that incorporate provisions of IDEA or extend its provisions to private school settings.

Impact of Vouchers on the Six Principles of IDEA

Special education, as governed by IDEA, supports six principles for the delivery of a free appropriate public education to all students with disabilities. Private school choice through vouchers alters this existing paradigm. Most obviously, it changes the "public" requirement to "public or private." Voucher programs also affect the six principles currently supported by special education law by classifying all children with disabilities in voucher programs as "voluntarily" placed. The scope and significance of these legal changes are summarized below with regard to the different possible structures for state (or future federal) voucher programs.

Zero Reject. Section 504 and the ADA provide some federal protection against discrimination in the administration of general education and special education voucher programs. While public school districts will most likely still be bound by the child find requirements of IDEA, children with disabilities who utilize vouchers to attend private schools will not have protection from exclusionary practices in the private school setting, such as removal of architectural barriers or discontinuation of services during expulsion or suspension. States may provide additional protections by including anti-discrimination language in the voucher statute, requiring compliance with state or federal disability law, or structuring their program to minimize concerns about discrimination by providing need-based funding, using random selection of applicants in admission, or monitoring the attendance and participation of individuals with disabilities in each private school.

Non-discriminatory Evaluation. As with the initial child find requirements of the public school district, students with disabilities in voucher programs may have the right to a non-discriminatory evaluation even if the state does not include it in its criteria for private school participation in the voucher program. The extent of such IDEA protections have not been tested and may in fact be limited to an initial evaluation or to certain classifications of students. Without further regulation, the private schools themselves may evaluate or not, for whatever purpose they choose, and use whatever method or methods they wish. They are in no way required to use or build upon any evaluation provided by the school district.

Individualized and Appropriate Services. Private schools are simply not bound by the requirements of IDEA to ensure each student with a disability receives an individualized and appropriate education. Private schools are not required to create individualized education programs. If private school programs fail to address the needs of a student with a disability or provide anything other than general education services, there are no legal consequences unless they are built into the voucher program. Public schools may extend some services to some students with disabilities in these voluntary private school settings, but there is no specific requirement in IDEA that the public school ensures the private school provides an appropriate education. Accountability provisions ensuring individualized outcomes for such students would go a long way to ensuring appropriate education, but sadly, are not significantly present in current voucher programs.

Least Restrictive Environment. Private schools are free to abandon the LRE requirement almost entirely. Some schools that accept vouchers may in fact have entirely segregated programs or use separate schooling to serve individuals with disabilities without regard to their individual needs, strengths, or preferences. In the place of LRE, free market programs hold-up the principle of private school flexibility in the hopes that innovative programs that provide greater benefits to individuals with disabilities will be created or that the success of integrated classrooms will drive private schools to utilize less restrictive settings in the pursuit of voucher dollars. There is not yet sufficient evidence to support such a questionable assumption, and without a legal requirement or additional funding for students with disabilities it seems more likely that private schools will be motivated to cluster students with more extensive disabilities outside of general

education settings so as not to scare away the more cost-effective general education vouchers.

Due Process. Students with disabilities are entitled to equal educational opportunity and all IDEA due process rights within public schools, but upon entering private schools are generally limited to claims based on access (under the ADA) and constitutional rights. Neither constitutional rights nor the ADA guarantees any educational benefit or creates a cause of action or remedy for anything other than the most discriminatory conduct by the private school. Due process rights within voucher programs are limited to the basic law of contracts and torts unless otherwise provided for in the authorizing legislation or other state law.

Parent/student participation. Parental and student participation rights are non-existent in private school settings. This does not mean that parents won't be encouraged or even required to participate. Of all the principles of IDEA, this is the one that most connects to the theories behind free market models. Simply put, parents who choose to be in a voucher program have already shown that they would like to have some control over their child's education. Since parents are also the decision-makers with regard to which schools receive the voucher dollars, it would be logical for schools to attempt to increase parental involvement as a "selling point" of their program and as a means of continual marketing to increase parental satisfaction. As with all market driven motivations, the weakness of this approach is with marginalized groups that do not have sufficient market power to influence the school. Without expanded protections, individuals in a dissatisfied minority will have no recourse except to pull their students out of the private school.

Vouchers and the Principles of NCLB

Rod Paige, the Secretary of the Department of Education recently released a set of principles for the reauthorization of IDEA. One of those principles is "increase choices and meaningful involvement of parents." Despite the phrase "meaningful involvement of parents" and its similarity to "parent participation," the description under this principle's heading is almost entirely about the availability of school choice in both the public and private sector. Private school vouchers are undoubtedly a key focus of this principle.

Paige also expounds upon three other principles for IDEA reauthorization to better align IDEA with the No Child Left Behind Act: accountability for results, increasing local flexibility, and a focus on what works. It is reasonable to suggest that a framework of principles to reform IDEA should, at a minimum, be internally consistent and mutually reinforcing. Yet, it is difficult to argue that voucher programs support these other three principles.

A lack of accountability is one of the most common criticisms of voucher programs. As mentioned earlier, extension of public school accountability requirements under IDEA to private school voucher recipients was a centerpiece of the recommendation put forward by the President's Commission on Excellence in Special Education, in order to ensure "excellent results" (PCESE Report, 2003, p. 39). While

voucher programs arguably increase local flexibility, IDEA does not currently forbid the creation of voucher programs. IDEA allows states to expand the benefits they provide to students with disabilities in private school settings. Therefore, the only way to increase flexibility in IDEA with respect to the creation of private school voucher programs would be to allow voucher programs to supplant the requirement for the provision of FAPE for parents who choose to accept the vouchers. Such a change would bring into question, again, the tenuous connection between voucher programs and accountability.

Finally, and perhaps most importantly, there is the question of efficacy. The NCLB and Paige's "doing what works" principle requires schools, local education agencies, state education agencies and the Federal Department of Education to adopt research and evidence-based practices. Therefore, in keeping with this principle, it is important to discern, before enacting private school choice provisions, whether voucher programs meet this standard.

In the next section, we summarize the evidence that has emerged through various research investigations of free-market voucher programs as these outcomes are referenced against the stated reasons for advocating these choice options. Thus far such evidence applies only to outcomes for schools and for general education students, since no systematic, controlled studies have appeared to date focused on students with disabilities. The applicability of vouchers to students served under IDEA must therefore be judged on the basis of inferences drawn from findings on the general education population against a backdrop of special statutory and programmatic concerns of this special needs population as discussed above.

EVIDENCE FROM RESEARCH

Where school choice is at issue, the literature is long on strongly felt rhetoric on both sides, but woefully short on evidence with which to either advance or retire particular choice models. Predictably, the choice debate can be framed as a labor-management dispute, since teacher unions are not a factor in private sector schools. Much pro-voucher advocacy stems from the Washington DC-based Brookings Institution and its university research colleagues (i.e., Howell, Peterson, Wolf, and Campbell, 2002) together with the Black Alliance for Educational Options, a conservative African American educational advocacy group (i.e., Barato, 2001; Colyman, 2001). Anti-choice positions emanate from the American Federation of Teachers (AFT) (i.e., AFT Center on Privatization, 1997; AFT On the Issues, 1998) with positional support from the People For the American Way Foundation (i.e., Nelson, Egen & Holmes, 2001).

The search for scientific evidence in support of free-market choice models led one researcher to conclude, "In spite of the expanding national conversation about vouchers, we don't know a great deal about them. During my search in graduate school, I could not find a single study that had been done by an objective researcher with a rock-solid methodology" (Fish, 2002, p. 41).

Setting aside, for the moment, the issue of "objectivity", there are at least some controlled, large sample empirical studies as well as one qualitative study of some 16 schools, both public and private, conducted in California that have reported voucher outcomes for schools, student performance and family satisfaction. Those will be reviewed in this section. Turning to evidence for students with disabilities, however, draws a blank. This population was not a factor in the studies to date, so no evidence-based judgments can be drawn. The McKay Scholarship program in Florida affords the best opportunity to systematically examine outcomes associated with special education vouchers, but to date only anecdotal information from newspapers has appeared.

The dominant argument in favor of vouchers for general education students is one of parent empowerment. When schools fail to meet the educational needs of children, families should be able to "break the monopoly of public schools" (Chubb & Moe, 19____) and choose among alternatives, including private schools, with public assistance. The net impacts according to voucher proponents will be: 1) better educational outcomes for students who opt to use vouchers; and 2) improved public schools, since these will need to successfully compete for students or close down altogether. Obviously, #1 will: a) be dependent on availability and affordability of choice options; and b) be dependent on accurate and reliable information available to parents to enable them to make reasoned and informed choices for their children from among alternatives.

Some evidence exists for the question of educational gains from several large sample, longitudinal investigations in urban areas that have had voucher programs for general education students in place for several years. These include studies from New York, Cleveland, Dayton and Washington, DC. No evidence from controlled studies to date provides support either for or against the school-improvement-due-to-competition argument. Some fairly large-sample survey research studies have appeared that contribute evidence with which to evaluate the level and quality of choice-option information available to families, particularly those in areas of the country where voucher options exist. These investigations and survey reports are reviewed below. No systematic studies of Florida's McKay Scholarship Program could be found, so extrapolation from the research literature to the case of special education vouchers should be undertaken with caution.

Controlled Empirical Studies in Urban Settings

Cleveland/Milwaukee studies. According to the Government Accounting Office (GAO, 2001), the systematic studies of voucher programs in Cleveland and Milwaukee ". . . satisfied most of the basic criteria for research quality, such as using study designs and data analysis methods that isolate the programs effect, but they suffered from missing test score data, low survey response rates, and the loss of students from program groups and comparison groups over time" (p.5). The GAO report represents a synthesis of published studies from a variety of research teams, but relied only on those reports that met the GAO standards for scientific evidence. Cleveland and Milwaukee were chosen for the GAO report because, together with statewide programs in Florida, Maine and Vermont, they constitute the only *publicly funded* voucher programs. Maine and Vermont

were not included because they serve geographically isolated rural populations and are designed for a different purpose than the urban programs. Florida, which began its voucher program in 1999, was too recently implemented to be included. Other urban studies such as those in Washington, DC, New York, Dayton and San Antonio are *privately funded* voucher programs and studies of those are discussed separately below. Finally, as pointed out by Fish (2002), these studies were funded by pro-voucher sources conducted by researchers who had a prior publication record of pro-voucher position statements (cf., Howell, Peterson, Wolf, & Campbell, 2002).

In the 1999-2000 school year, Cleveland had 3400 voucher students enrolled in 52 private schools, which received about $5.2 million in publicly funded voucher payments. The Cleveland District in that year served about 76,000 students in 121 schools with a total budget of about $712 million. Milwaukee in that year had 7,621 voucher students enrolled in 91 schools with about $38.9 million in voucher payments. The Milwaukee School District in that year had about 105,000 students in 165 schools supported by a total budget of $917 million.

In Cleveland, vouchers were worth either $2,250 or $1,875 depending on family income level. In Milwaukee, the maximum voucher award was set at $5,106. In that year, Ohio spent $1,832 per voucher student compared to $4,910 per student for those who remained in Cleveland Public Schools. Wisconsin spent $5,106 per voucher student compared to $6,011 per student for those served in Milwaukee schools (GAO, 2001, p. 22). In the Ohio sample, 90 percent of the voucher-receiving schools were religious, accounting for 97 percent of the voucher students.

The GAO report concluded that *no significant differences on academic achievement could be attributable to private school participation by publicly funded voucher students compared to control students in the regular public schools of the two cities* (p. 27). The GAO Report notes that two different research teams, one from Princeton on contract to the program (cf., Sterr & Thorn, 2000) and another from Harvard funded by the Brookings Institution (cf., Howell, Peterson, Wolf & Campbell, 2002), reported somewhat conflicting findings, probably due to different methodologies.

New York, Dayton and Washington, DC studies. Large sample, controlled studies of the effects of vouchers on selected educational outcomes attributable to *privately funded* voucher programs are available from these three cities (GAO, 2002). According to this GAO report, as of 2002, approximately 46,000 of an estimated 53 million school-age children are served on private vouchers totaling about $60 million in tuition assistance. Conclusions from the GAO private voucher research synthesis and analysis were drawn from some 78 programs focused primarily on low-income students. The average voucher in the 2001-2002 school year ranged from $600 to about $2000 per student (GAO, 2002, p.2).

Results from the New York, Dayton and DC studies were gleaned from the Brookings/Harvard investigations (Howell, Peterson, Wolf, & Campbell, 2002). The sum of results from these studies led GAO to conclude: *1) significant improvements for*

African American students in math and reading compared to public school controls; 2) voucher parents (all ethnic groups) were significantly more satisfied than control parents with their children's education; 3) there were differences across the three cities in African American students' continuity of progress in math and reading; and 4) no significant differences were found for other ethnic groups, most notably Latinos which comprised nearly half of the sample. (GAO, 2002: p.3). If results are pooled for all ethnic groups, no significant differences are revealed.

The investigations revealed that the private schools receiving voucher students had fewer students, smaller class sizes, were more likely to offer tutoring and communicated more with parents, than the controls in public schools. Voucher students' parents reported fewer services (i.e., school nurse, cafeteria, special education services, language services). Voucher families reported significantly less disruption in their children's schools than control families.

The methods and results of the combined, privately funded voucher programs in New York, Dayton, and Washington, DC are reviewed comprehensively in the book by Howell, Peterson, Wolf & Campbell (2002). The individual studies in each city are contained in West, Peterson & Campbell (2001) for Dayton; in Wolf, Peterson & West (2001) for Washington DC; and in Mayer, Peterson, Myers, Tuttle & Howell (2002) for New York City. The American Federation of Teachers (AFT on the Issues, April, 1998) reviewed a series of studies that challenged the conclusions of the Brookings/Harvard group. The conclusion of these studies suggests that class size may be the primary source of the positive findings of the privately funded voucher studies. AFT argues that the data suggest that if the same amount of money provided in the vouchers were provided to a controlled public school study on class size reduction, the results would be comparable (p. 3).

Results from a Qualitative Investigation

Some support for the AFT position may be inferred from the findings of a qualitative investigation of 16 schools in California and reported in the book, *All Else Equal* by Luis Benveniste, Martin Conway & Richard Rothestein (p. 003). The authors report the results of a rigorous case study analysis of eight public and eight private schools (no secondary schools) in California. These schools were selected on the basis of an attempt to stratify the sample for demographic characteristics, particularly the level of affluence of communities served by the schools.

The authors reported, "To our surprise, we found few of the differences that we expected to find between public and private schools in similar communities (p. xii). They noted that in low-income, urban communities both public and private school teachers and administrators complained of a lack of parent involvement. In affluent communities, both types of schools complained of "too much parent involvement" (p. xiii).

Benveniste, et al. (2003) concluded that socioeconomics is the important predictor variable in determining student achievement, not whether education is provided in a

public or private school. With respect to parent involvement, they found, "Both private and public schools serving low income families find it difficult to get parents to participate. Both private and public schools serving high-income families have to control overzealous parents". (p. 190).

Results from Large Sample Surveys

Peterson & Campbell (2001) reported the results of a national telephone survey of over 2300 applicants for the Children's Scholarship Fund, a source of vouchers for low-income students awarded on a national basis through a lottery selection process. The results suggested: higher school satisfaction from the private school voucher users; fewer discipline problems; more respect from teachers; and more racially integrated schools (pp. 2-4). These findings generally corroborated the findings of the New York, Dayton, Washington, DC studies reported above.

The Educational Resources Information Center (ERIC), Clearinghouse on Educational Management at the University of Oregon, reviewed public opinion poll results on the topic of vouchers, finding that public support for school voucher programs has declined from 61 percent favorable in 1999 to 52 percent in 2001 (Rose & Gallup, 2001). In addition, the Phi delta Kappa/Gallup polls reflect increases in the percentage of public support for requiring private schools taking vouchers to be as accountable as public schools, 83 percent in 2001 (Rose & Gallup, 2001). A similarly high level of support (80 percent) for requiring private voucher recipient schools to meet basic curriculum and teacher certification standards was reported from a random sample of 800 respondents (Peter S. Hart Research Associates Poll, 1998).

A telephone poll by Zogby International (National School Boards Association News Release, September, 25, 2001) of 1,211 adults with a high proportion of African Americans, reported an even split of 40 percent for and 40 percent opposed to vouchers. 90 percent of the respondents said that private schools accepting vouchers should be held to the same accountability standards as public schools. When the data from African Americans in the sample were analyzed separately, 57 percent of the respondents opposed vouchers compared to 41 percent in favor (NSBA, 2001). This finding is at variance with the results of the Harris Interactive Survey (Zeelberger, 2002) that found 47 percent of African Americans in favor of vouchers compared with 39 percent of whites.

Using a combined methodology of telephone interviews and mail surveys, a public opinion poll found that most people had never heard of "school vouchers" (80 percent) including people in communities such as Cleveland and Milwaukee (75 percent) that had voucher programs in place for several years (Public Agenda, 1999). The same poll on a National survey of 1200 adults age 18 and over found some support for school vouchers among Blacks (68 percent favorable) and Hispanics (65 percent favorable), but less support when whites and others were factored in (57 percent favorable).

In their report "On Thin Ice", the Public Agenda poll concluded ". . . most citizens have only the vaguest notion what terms like 'voucher' and 'charter school' mean much less how these ideas might affect their own lives" (Wadsworth, 1999, p.1).

Also, "When it comes to public education, large numbers of Americans are frustrated with business as usual . . . But at this point in the discussion, neither the advocates of alternative solutions nor the defenders of public schools have the public's full authorization for their agenda. Vouchers and Charter school advocates need to wrestle with the public's sense that while such approaches may have merit, they represent a partial solution at best" (p. 1).

In summary, the results of polling research on the topic of vouchers contribute no evidence toward assessment of the extension of school vouchers to students with disabilities. For general education students, *the poll results suggest that the general public has only a dim recognition of the debate over vouchers, and public support for them may be declining over time. When voucher users are polled, families report more favorable responses to their children's private school experiences when compared to those polled whose children remained in urban public schools.*

Finally, the survey research *results strongly suggest that the general public favors holding private schools to the same accountability standards applied to public schools, if public funding is to be extended to these schools through vouchers.* The survey results suggest also that *for most people, the religious affiliation of many of the private schools is not a substantive issue.*

Anecdotal Information from Florida

Florida has three voucher programs in operation at present. The original program is called the Opportunity Scholarship Program, and makes vouchers available to students whose schools make "Fs" on their school's state assessment report cards for two out of four years. This program began in 1999 with about 50 students in Pensacola where two schools received the two requisite 'F' grades, the only schools in the state to do so (Hegarty, 2002). In September 2002 the number of eligible voucher public schools had risen to 10 making some 8900 students eligible for vouchers. Of these, 446 have accepted vouchers (65 percent) and transferred to private schools (Hegarty, 2002, p.1B). In August 2002, the Opportunity Scholarship Program was ruled unconstitutional by a circuit court judge but was immediately appealed by the State of Florida, so it remains in effect pending the appeals process. The ruling addresses the State constitution's ban on using public money to benefit religious institutions. (Vlferts, 2002, p. 1A). This ruling and its subsequent appeal did not apply to or affect the McKay Scholarship Program.

A second program offers partial "scholarships" to poor children, funded by corporations that receive tax deductions equal to the amount they contribute. In September of 2002, some 13,800 children had transferred to private schools with assistance from this "voucher" program, although the program was declining in 2002 due to fewer corporate donations (Hegarty, 2002, p. 1B).

The third program, designed specifically for students with disabilities, is the McKay Scholarship Program, started in 2002. As of September 2002, the McKay Program attracted some 7000 students during the 2002 school year; nearly double the

enrollment over the previous year. In 2003, the program rose to 8,644 students (East, 2003). In 2002, for example, 580 children with disabilities left Pinellas County Public Schools for private schools at a cost of 4 million dollars to the Pinellas County school budget (Hegarty, 2002, p. 1B). The county receives $5,500 for each student who, for example, has a learning disability, but loses about $7,500 when the student leaves with a voucher (East, 2003).

Pinellas County is home to the *St. Petersburg Times*, which ran a series of investigative articles from November 13, 2002 through December 9, 2002 on one of the 31 private schools in the county registered with the state to be a provider of services to students with disabilities under the McKay Scholarship Program. There are 545 such private providers in the state as a whole (St. Petersburg Times Editorial, November 13, 2002).

The school, called the "Excellence Academy" was described in the editorial: ". . . a religious school in St. Petersburg, is an estate in foreclosure, with broken windows, overgrown vegetation, no electricity or water for at least two weeks, no license to operate a school, and citations for housing code violations" (St. Petersburg Times, 2002). According to the newspaper, the school received $28,323 for six voucher students over the previous school year (Hegarty, 2002, p. 3B). Following exposure of the Excellence Academy shortcomings in the St. Petersburg Times, the State moved the Academy from the approved list to disapproved, and suspended tuition payments of $7100 per student of the $8,500 per student charged as tuition by the Academy (Hegarty, 2002, p. 1B).

The newspaper reported that, "Parents at a former St. Petersburg church school, for example, complained of physical abuse, lack of textbooks and unqualified staff. Staff at a panhandle school held a press conference last year to allege their bosses were defrauding the state, that the school was accepting voucher checks for students who no longer attended, that students were not being provided promised educational services. Who is watching over these children?" (East, 2003).

In an editorial, the St. Petersburg Times opined: "certainly, some of the registered schools are established providers in the difficult arena of special education, which takes extensive training, small class sizes and caring adults to be successful. Unfortunately, some have popped up overnight by the lure of easy money, which helps explain some disturbing allegations that have surfaced around the state: outdated text books, unqualified teachers, physical abuse, lack of specialized services, schools that cash voucher checks for students who are no longer enrolled."

"No one really knows how well the $49.6 million McKay program is working because these who oversee it are covering their eyes. Ask how these private schools are performing or whether students and families are happy or even whether tax dollars are being disbursed in accordance with state law and the response tends to follow two paths: 1) we trust parents to make smart decisions for their students, or, 2) we don't know."

"When asked how many schools had been created to serve only tax-supported voucher students, education spokesman, Bill Edmonds, recently responded: "What's the point of knowing that?"

"The point is that even the best endeavors, and especially new ones, need careful oversight and continued improvement. Are families pleased? How many students are returning to public schools and why? What do district educators say? Are the financial controls sufficient? Is the reimbursement too much or too little? Are the schools generally accredited and stable, or are they going out of business and leaving students in the lurch?" (St. Petersburg Times Editorial, December 9, 2002).

These quotes from a Florida newspaper are not offered here as any evidence for or against the extension of vouchers to students with disabilities. However, the reporting and editorials do call attention to the issue of the need for accountability standards and oversight for private school providers who accept public vouchers for the education of students with disabilities.

CONCLUSIONS

As part of its advisory mission to the Congress, the President, and members of the executive Branch, NCD has evaluated the rationale for the extension of vouchers to students with disabilities. In this paper, NCD has also examined how school choice is working. Part and parcel of this examination has included an examination of the impact of existing programs and what, if any, lessons could be learned from them. From these analyses and related findings, NCD has determined that there are a number of guiding questions that should be addressed by key policy makers and education leaders as they proceed further in the current school-choice and special education reform debate.

The issue of extending vouchers to students with disabilities is not at all straightforward and is problematized by several important concerns. First, it is not at all clear that the primary rationale for the provision of vouchers to general education students, namely to assist them to escape low-performing schools, and thus, through the competition with private schools so created, accomplish public school reform, holds water for students in special education. Since many of the students served under IDEA did not participate in the standardized tests used to produce school "grades" and other rankings, it is not clear that the school problems extend to that population.

Also, there is the issue of "critical mass." School Districts, with 28 years of experience in providing educational services and supports to students with disabilities, have acquired and maintain an infrastructure for this specialized support. This infrastructure may particularly reflect specialized administrative personnel, teachers, highly specialized speech and other therapists, specialized adaptive equipment such as Braille writers, adapted computers, occupational therapy equipment, wheelchairs, etc. Loss of the typical "caseload" of students with disabilities and the money provided by the state for their education could significantly impact the ability of these districts to

maintain the infrastructure, and thus could negatively impact services to the students who remain in district schools.

Finally, it is not at all clear whether existing private schools want to serve students with disabilities or indeed can provide their specialized services and needed supports in the absence of the kind of critical mass enjoyed by school districts. IDEA, for example, recognizes the importance of family participation in the child's educational plan, but also legitimizes the expertise of specialized staff and personnel who have specific knowledge and competencies for providing a free, appropriate public education (FAPE) to students with disabilities. To place the burden on parents to seek out a private alternative to provide the kind of specialized educational program needed to serve their students with disabilities may be unreasonable. In Florida, the special education vouchers are apparently providing the stimulus for new schools to come into existence to serve only students with disabilities. This movement, however, could reverse the scientifically documented findings supporting the provision of educational services to students with disabilities in the least restrictive environment of inclusive opportunities (i.e., Sailor, 2002). The end result of large-scale voucher extensions to students with disabilities could lead to a new kind of institutionalization at public expense

NCD believes it is time for a more informed debate and deliberative decision making in the education reform arena. NCD also believes that by addressing the guiding questions posed at the front of this paper, and pursuing the areas of research detailed above, parents, students with disabilities and decision makers will be better prepared to determine whether school-choice is the right choice or not for students with disabilities.

About NCD

The National Council on Disability (NCD) was initially established in 1978 as an advisory board within the U.S. Department of Education. As of the passage of the Rehabilitation Act Amendments of 1984, NCD stands as an independent federal agency established to review and report on national disability policy, programs, practices and procedures. It is composed of fifteen members approved by the President and confirmed by the Senate. The mission of the agency is to promote policies, programs, practices, and procedures that guarantee equal opportunity for all people with disabilities, regardless of the nature or severity of the disability, and to empower them to achieve economic self-sufficiency, independent living and inclusion and integration into all aspects of society.[2]

In 1984, NCD first proposed that Congress should enact a civil rights law for people with disabilities. This law came to fruition in 1990 as the Americans with Disabilities Act, the ADA. In 1996 NCD hosted a national policy summit, attended by more than 300 disability community leaders to develop strategies for effective enforcement of existing disability civil rights laws. Since then, NCD has produced a number of reports, including Enforcing the Civil Rights of Air Travelers with Disabilities (1999); Back to School on Civil Rights (2000); Promises to Keep: A Decade of Federal Enforcement of the Americans with Disabilities Act (2000); The Accessible Future (2001); and Reconstructing Fair Housing (2001).

These and other reports reflect the statutory mandate of NCD, which calls for: a) review and evaluation of federal policies on disability, including practices, programs and procedures established under the Rehabilitation Act, the Developmental Disabilities Assistance Act and the Bill of Rights Act; b) review and evaluation of all statutes and regulations pertaining to federal programs established for people with disabilities; c) review and evaluation of emerging federal, state, local and private policy issues affecting people with disabilities; d) providing recommendations to the President, Congress, the Secretary of Education, the Director of the National Institute on Disability and Rehabilitation Research, and other officials of federal agencies, on ways to promote equal opportunity, economic self-sufficiency, independent living, and inclusion and integration into all aspects of society for people with disabilities; e) provision of advice to the President and Congress on a range of additional policies and activities affecting people with disabilities; and f) preparation of an annual report to the President and Congress, *National Disability Policy: A Progress Report.*

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[2] *Special Education Report 29*:1, Jan. 2003.

[3] *Special Education Report. Vol. 29*:1, January 2003.

[4] Goldstein, L. F. (2002, December 4). Election results boast special education vouchers. *Education Week.*

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